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In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Petitioners,

vs.

CITY OF NEDERLAND and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a showing that a municipality intended to regulate in an area expressly reserved by Congress is a necessary element of a preemption violation which is based upon the effects caused by municipal regulation in a different area.

II. Whether a facially neutral statute that has a discriminatory effect against interstate commerce must be motivated by protectionist intent in order to constitute discrimination under the Dormant Commerce Clause.

III. Whether a Dormant Commerce Clause challenge should be allowed to proceed to trial where there is evidence of a burden on commerce and less burdensome alternatives to achieve the state's purpose.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. Petitioner Texas Manufactured Housing Association, Inc. ("TMHA"), has a single wholly-owned subsidiary named TMHA Services, Inc., which is a for-profit corporation organized under the laws of the State of Texas, engaged principally in the sale of publications and forms for the use of businesses involved in the manufactured housing industry. With the exception of TMHA Services, Inc., TMHA has no parent and no other subsidiaries or affiliates.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statute Involved	1
Statement of the Case	2
Reasons for Granting the Writ	5
I. Where A Municipality's Regulatory Scheme Has The Effect Of Encroaching Upon An Area Expressly Reserved By Congress, A Showing That The Municipality Intended To Create The Effect Is Not A Necessary Element Of A Preemption Violation.	7
II. Where A Facially Neutral Statute Discriminates Against Interstate Commerce In Its Practical Effect, Proof Of Protectionist Intent Is Not Required In Order To Establish Discrimination Under The Dormant Commerce Clause.	10

Contents

Page

III. Where There Is Evidence Of A Burden On Interstate Commerce And Less Burdensome Alternatives To Achieve The State's Purpose, Summary Judgment Is Inappropriate To Dispose Of A Dormant Commerce Clause Challenge. . . 12

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) ... 10

Blue Circle Cement, Inc. v. Board of County Commissioners, etc., 27 F.3d 1499 (10th Cir. 1994) .. 13

Bourgeois v. Parish of St. Tammany, La., 628 F.Supp. 159 (E.D. La. 1986) 9

C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383 (1994) 10

Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 7

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 12

Colorado Manufactured Housing Association v. Board of County Commissioners, etc., 946 F.Supp. 1539 (D. Colo. 1996) 5, 9

Contents

	Page
Cotto Waxo Company v. Williams, 46 F.3d 790 (8th Cir. 1995)	13
Dean Milk Co. v. Madison, 340 U.S. 349 (1951)	11, 14
Electrolert Corp. v. Barry, 737 F.2d 110 (D.C. Cir. 1984)	14
Ferndale Laboratories, Inc. v. Cavendish, 79 F.3d 488 (6th Cir. 1996)	13
Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	5, 7
Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. 353 (1992)	11, 14
Fulton Corp. v. Faulkner, __ U.S. __, 116 S.Ct. 848 (1996)	11
Gary D. Peake Excavating, Inc. v. Town Bd. of Town of Hancock, N.Y., 93 F.3d 68 (2d Cir. 1996)	13
Georgia Manufactured Housing Association, Inc. v. Spalding County, Ga., No. 3:94-CV-51-GET (N.D. Ga., unreported, June 13, 1996)	9
General Motors Corporation v. Tracy, 117 S.Ct. 811 (1997)	12

Contents

	Page
Grant v. County of Seminole, Fla., 817 F.2d 731 (11th Cir. 1987)	9
Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985)	8
Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)	10
Instructional Systems, Inc. v. Computer Curriculum Corp., 35 F.3d 813 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 1176 (1995)	13
Jones v. Rath Packing Co., 430 U.S. 519 (1977)	7
Kirkpatrick v. Shaw, 70 F.3d 100 (11th Cir. 1995)	13
Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson, 48 F.3d 391 (9th Cir.), *cert. denied*, 115 S.Ct. 2580 (1995)	13
Maine v. Taylor, 477 U.S. 131 (1986)	11
Medical Waste Associates Limited Partnership v. Mayor and City Council of Baltimore, 966 F.2d 148 (4th Cir. 1992)	13
Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992)	7

Contents

	Page
National Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652 (7th Cir. 1995), *cert. denied,* 116 S.Ct. 1351 (1996)	12, 13
New Hampshire Motor Transport Ass'n v. Town of Plaistow, 67 F.3d 326 (1st Cir. 1995), *cert. denied,* 116 S.Ct. 1352 (1996)	13
Old Bridge Chemicals, Inc. v. New Jersey Dept. of Environmental Protection, 965 F.2d 1287 (3d Cir.), *cert. denied,* 506 U.S. 1000 (1992)	13
Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, 511 U.S. 93 (1994)	6, 11
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	6, 11, 12, 13, 14
Scurlock v. City of Lynn Haven, 858 F.2d 1521 (11th Cir. 1988)	5, 7, 8, 9
Toomer v. Witsell, 334 U.S. 385 (1948)	12
Statutes Cited:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	3
42 U.S.C. § 5401, *et seq.*	1, 3

Contents

Page

42 U.S.C. § 5403(d) 1, 5, 8

Tex. Rev. Civ. Stat. Ann. art. 5221f § 4A(a) (Vernon Supp. 1996) 4

Tex. Rev. Civ. Stat. Ann. art. 5221f-1 (Vernon Supp. 1996) 4

United States Constitution Cited:

Commerce Clause ..... *passim*

Other Authority Cited:

National Homeownership Strategy: Partners in the American Dream (1995) 9

APPENDIX

Appendix A — Per Curiam Opinion of the United States Court of Appeals for the Fifth Circuit Filed January 28, 1997 ..... 1a

Appendix B — Opinion of the United States Court of Appeals for the Fifth Circuit Dated December 26, 1996 ..... 3a

Appendix C — Memorandum Opinion and Order of the United States District Court for the Eastern District of Texas, Beaumont Division Entered October 16, 1995 ..... 27a

Contents

Page

Appendix D — Memorandum Opinion and Order of the United States District Court for the Eastern District of Texas, Beaumont Division Entered September 7, 1995 ..... 34a

Appendix E — HUD Report Dated May 2, 1995 .... 49a

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 101 F.3d 1095 and is reproduced in the Appendix filed herewith ("App.") at 3a. The opinions of the district court in this case are reported at 905 F.Supp. 371 and are reproduced in the Appendix at 27a and 34a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 26, 1996. On January 9, 1997, Petitioners filed their Petition for Rehearing, which was denied by the Court of Appeals on January 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. § 5401 *et seq.*, is set forth below:

> § 5403
>
> (d) Supremacy of Federal standards
>
> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured

home which is not identical to the Federal manufactured home construction and safety standard.

STATEMENT OF THE CASE

This is a case about an individual's freedom to choose the type of single-family dwelling to place on his or her own property. A.J. Waller, Sr. is an elderly resident of the City of Nederland, Texas, a small town in southeast Texas. He has owned and occupied the property which is located at 2120 Helena Avenue for almost forty years. In 1994, Mr. Waller requested a building permit from the City of Nederland to permanently site a new "HUD-code manufactured home" on his property. The home was to replace a "site-built" house which Mr. Waller described as "old" and "dilapidated" and injurious to his health. For sake of clarity, a "HUD-code manufactured home" is distinguished from a "mobile home" in that the former was built after June 15, 1976 and meets preemptive federal construction standards promulgated by the United States Department of Housing and Urban Development; a "mobile home," built before such date, does not. The City denied Mr. Waller's request by citing its Ordinance 259, which prohibits the placement of "trailer coaches" anywhere in the City except in so-called "trailer parks." Mr. Waller appealed the decision to the Zoning Board of Appeals of the City of Nederland, to no avail.

In June of 1994, Mr. Waller, joined and supported by the Texas Manufactured Housing Association, Inc. ("TMHA"), the statewide trade association representing the manufactured housing industry in Texas, filed a complaint in the United States District Court for the Eastern District of Texas. Mr. Waller and TMHA alleged that Ordinance 259 is preempted by federal law, namely, the National Manufactured Housing Construction and

Safety Standards Act of 1974, as amended, 42 U.S.C. § 5401 *et seq.* They also challenged the constitutionality of Ordinance 259, alleging a violation of the Dormant Commerce Clause, a denial of substantive due process and equal protection, takings, and other deprivations of Mr. Waller's civil rights. Subject matter jurisdiction over all these claims was proper under 28 U.S.C. § 1331.

In September of 1995, District Judge Howell Cobb dismissed the entire case by granting the City's motion for summary judgment. In dismissing the federal preemption claim, Judge Cobb focused solely on the purpose of Ordinance 259, finding that "Nederland is not attempting to exclude the plaintiff's mobile home from areas of the city based solely on the city's safety code." 905 F.Supp. at 376 (App. D, 39a) (internal quotation marks and brackets omitted). Regarding the Dormant Commerce Clause challenge, Judge Cobb found that Ordinance 259 does not discriminate against interstate commerce because "Nederland's zoning scheme does not differentiate between HUD-code homes built within the state and those built outside the state." 905 F.Supp. at 379 (App. D, 45a). Judge Cobb then subjected Ordinance 259 to a balancing test, holding that "Ordinance 259 is not unduly burdensome on interstate commerce," especially in light of the "traditional state police power concerns the ordinance addresses." 905 F.Supp. at 379 (App. D, 45a). Judge Cobb found that Ordinance 259 is "simply meant to conserve property values," 905 F.Supp. at 379 (App. D, 45a), but the record reveals that Mr. Waller would have been allowed to install a "modular" home, which is another species of factory-built housing.[1] The record also reveals that a

1. A modular home and a similarly equipped HUD-code manufactured home look virtually identical in terms of their outward visual characteristics. The difference lies in the construction standards to which each is built. Since 1976, all manufactured housing in the United States is built to the HUD code. (Cont'd)

pre-1976 "mobile home" is currently situated on Mr. Waller's property and has been occupied by one of his sons there for many years. Had he chosen to do so, Mr. Waller could have freely replaced that "mobile home" with a "HUD-code manufactured home" without Nederland's approval. *See* Tex. Rev. Civ. Stat. Ann. art. 5221f, § 4A(a) (Vernon Supp. 1996). Finally, the record reveals that the property surrounding Mr. Waller's lot includes a so-called "trailer park" and parcels that are widely divergent in terms of their uses and values. Petitioners filed a Motion for Reconsideration, urging a reexamination of the Dormant Commerce Clause and federal preemption claims. Judge Cobb denied the Motion on October 9, 1995.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed. In its discussion of the federal preemption claim, the Fifth Circuit relied on the language of Ordinance 259 and found that the Ordinance "does not expressly link its provisions in any way to local safety and construction standards." 101 F.3d at 1100 (App. B, 11a). The court further held that Ordinance 259 does not "affirmatively" discriminate against interstate commerce because it "treats HUD-code manufactured homes built in state identically to those built out of state," and that "the mere fact that a statute has the effect of benefitting a local industry while burdening a separate interstate industry does not in itself establish that the statute is discriminatory." 101 F.3d at 1102 (App. B, 15a). Following this decision, Petitioners filed their Petition for Rehearing and their Suggestion for Rehearing En Banc. Both were denied on January 28, 1997.

(Cont'd)

In contrast, modular housing is regulated at the state level. In Texas, modular housing is built to the Texas modular building code, a code which is itself an amalgamation of various standardized building codes which are locally applied to "site-built" residential construction. *See* Tex. Rev. Civ. Stat. Ann., art. 5221f-1 (Vernon Supp. 1996).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to resolve a conflict with the Eleventh Circuit's decision in *Scurlock v. City of Lynn Haven, Fla.*, 858 F.2d 1521 (11th Cir. 1988). In *Scurlock*, the Eleventh Circuit held that a local land use ordinance which excluded any structures that were not built to its local building code was tantamount to imposing construction standards on HUD-code manufactured housing in violation of 42 U.S.C. § 5403(d). *Id.*, 858 F.2d at 1525; *see Colorado Manufactured Housing Association v. Board of County Commissioners, etc.*, 946 F.Supp. 1539 (D. Colo. 1996) (same). Attempting to distinguish *Scurlock*, the Fifth Circuit found that Nederland's reason for excluding manufactured housing has nothing to do with the particular standards to which such housing is constructed. 101 F.3d at 1042 (App. B, 11a) (no "link" between exclusion and construction standards). The Fifth Circuit's approach raises the issue of intent: if Nederland's regulatory scheme has the effect of imposing different construction standards on HUD-code manufactured housing in violation of 42 U.S.C. § 5403(d), is Nederland immune from attack simply because it alleges that the imposition of construction standards is not the object of Ordinance 259? Since intent should be irrelevant in preemption analysis, *see, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("The test [is] not whether [the two laws] are aimed at similar or different objectives"), this question must be answered in the negative. Without Nederland's intent, either putative or actual, to serve as the distinguishing characteristic, the Fifth Circuit's ruling is at odds with the Eleventh Circuit's decision in *Scurlock*, 858 F.2d 1521.

Another reason for granting the writ is to decide whether intent is a necessary element of a claim that municipal action violates the Dormant Commerce Clause. This Court has held

that a prima facie violation is stated if there is discrimination against interstate commerce, and in this context discrimination is defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, etc.*, 511 U.S. 93, 99 (1994). In many cases, differential treatment is motivated by protectionist intent, and, as a consequence, this Court has never been called upon to decide whether differential treatment that is alleged not to be motivated by protectionist intent still qualifies as "discrimination" under the Dormant Commerce Clause. The Fifth Circuit's opinion in this case effectively requires an affirmation of protectionist intent when it holds that a statute which "merely" creates uneven effects (*i.e.*, favors intrastate over interstate commerce) is not discriminatory. 101 F.3d at 1102 (App. B, 15a). This result, however, does not follow from this Court's jurisprudence in this area. Moreover, requiring proof of protectionist intent undermines the broad purpose to be served by enforcing the dormant aspect of the Commerce Clause.

Yet another reason for granting the writ is for this Court to establish a uniform rule for adjudicating Dormant Commerce Clause challenges under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). At present, the courts of appeals are divided on whether the *Pike* test can be applied as a matter of law at the summary judgment stage, or whether the factual components of the *Pike* test require a trial on the merits.

I.

WHERE A MUNICIPALITY'S REGULATORY SCHEME HAS THE EFFECT OF ENCROACHING UPON AN AREA EXPRESSLY RESERVED BY CONGRESS, A SHOWING THAT THE MUNICIPALITY INTENDED TO CREATE THE EFFECT IS NOT A NECESSARY ELEMENT OF A PREEMPTION VIOLATION.

When analyzing whether a particular statute is preempted by an act of Congress, the statute's putative purpose is not necessarily dispositive. In *Florida Lime*, 373 U.S. 132, this Court held that the "test [is] not whether [the two laws] are aimed at similar or different objectives." 373 U.S. at 142. This rule acknowledges that a statute designed to operate in one substantive area can have demonstrative effects in another. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992)(regulating advertising affects rates); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (common law damages actions have the effect of imposing affirmative requirements). Accordingly, when conducting preemption analysis, this Court examines "state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977).

The Fifth Circuit's opinion in this case ignored these principles and focused solely on Nederland's avowed purpose for excluding manufactured housing. The court apparently felt compelled to do so because this case is otherwise identical to the situation presented in *Scurlock*, 858 F.2d 1521. In *Scurlock*, a local land use ordinance required all homes which were situated in a particular zoning district to be constructed to the local building code. The ordinance, which was of general application, did not affirmatively impose building standards on HUD-certified manufactured homes. Nevertheless, the Eleventh

Circuit correctly held that linking inclusion to compliance with the local building code was tantamount to imposing construction standards on HUD-certified manufactured housing in violation of 42 U.S.C. § 5403(d). 858 F.2d at 1525. To distinguish *Scurlock*, the Fifth Circuit focused on the "linkage" issue and concluded that Nederland's reason for excluding manufactured housing has nothing to do with the particular standards to which such housing is constructed. 101 F.3d at 1100 (App. B, 11a).[2] By relying upon Nederland's reason for exclusion to decide the federal preemption question, the Fifth Circuit's approach is erroneous.[3] More importantly, if Nederland's intent is removed from consideration, as it properly should be, then the situation in Nederland is identical to the situation in Lynn Haven, and the Fifth Circuit's opinion in this case conflicts with the Eleventh Circuit's decision in *Scurlock*, 858 F.2d 1521.

By resolving this conflict with *Scurlock*, this Court will also bring order to an area of the law which is becoming increasingly crowded with irreconcilable decisions. In addition to the

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2. Petitioners' theory of "linkage" is that Nederland's acceptance of one form of factory-built housing (modular housing) and simultaneous exclusion of another (HUD-code manufactured housing) amounts to the imposition of construction standards on the latter when the only meaningful distinction between the two housing types is the building code to which each is constructed. This theory, supported by a 2,000-page summary judgment record, was ignored by the Fifth Circuit, which found that Nederland's "reason" for excluding manufactured housing is, simply, obedience to an ordinance which calls for the exclusion. 101 F.3d at 1100 (App. B, 11a).

3. The Fifth Circuit compounded its error by assuming that the purely economic purpose behind Ordinance 259 (*i.e.*, preserving surrounding property values) constitutes a weighty exercise of the police power which demands a high degree of deference. This Court's preemption cases, however, demonstrate that the degree of deference suggested by the Fifth Circuit is reserved for health or safety measures. *See, e.g., Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

Eleventh Circuit's decision in *Scurlock*, federal district courts in Colorado and Georgia have held that exclusionary zoning ordinances which discriminate against HUD-certified manufactured housing are preempted by federal law (42 U.S.C. § 5403(d)). *See Colorado Manufactured*, 946 F.Supp. 1539; *Georgia Manufactured Housing Association, Inc. v. Spalding County, Ga.*, No. 3:94-CV-51-GET (N.D. Ga., unreported, June 13, 1996). These preemption decisions join the growing number of other cases which have been decided under various constitutional theories, with mixed results. *See, e.g., Bourgeois v. Parish of St. Tammany, La.*, 628 F.Supp. 159 (E.D. La. 1986) (ordinance stricken under substantive due process); *Georgia Manufactured* (ordinance stricken under commerce clause, substantive due process, and equal protection); *Grant v. County of Seminole, Fla.*, 817 F.2d 731 (11th Cir. 1987) (case dismissed despite substantive due process and equal protection challenges). The constitutionality of exclusionary zoning against manufactured housing is far from settled, and the future portends further legal challenges. Manufactured housing built to preemptive federal standards, which accounted for one-fourth of all the single-family houses that were built in this country in 1995, plays a strategic role in the Clinton Administration's efforts to increase homeownership.[4] Given the inconsistent pattern of decisions emanating from the federal courts, the federal superintendence of the manufactured housing industry, the federal priority of homeownership, and the federal nature of the legal issues involved, a single, unifying resolution by this Court is urgently needed at this time.

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4. *The National Homeownership Strategy: Partners in the American Dream* (1995) (working paper prepared by United States Department of Housing and Urban Development) (App. E).

II.

WHERE A FACIALLY NEUTRAL STATUTE DISCRIMINATES AGAINST INTERSTATE COMMERCE IN ITS PRACTICAL EFFECT, PROOF OF PROTECTIONIST INTENT IS NOT REQUIRED IN ORDER TO ESTABLISH DISCRIMINATION UNDER THE DORMANT COMMERCE CLAUSE.

In enforcing the "dormant" aspect of the Commerce Clause, this Court has never required proof of protectionist intent as a precondition for finding that a statute discriminates against interstate commerce. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352 (1977) (there is no need to "ascribe an economic protection motive" to find discrimination). The reason for not requiring protectionist intent lies in the political theory underlying the Commerce Clause. The Commerce Clause was designed to promote national solidarity, to reduce the incidence of regional jealousies and retaliatory measures which result from economic protectionism. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). It is the threat to national solidarity, not the economic effects of protectionism *per se*, that is the real danger addressed by the Dormant Commerce Clause. Accordingly, if effects resembling economic protectionism are felt, then the danger of retaliatory reprisals will not be lessened in the slightest merely because the effects result from measures which, in fact, were not motivated by protectionism. Intent, therefore, is too narrow to serve as the focal point; instead, the proper focus should be on the regulation's effect in the marketplace.

In derogation of these principles, the Fifth Circuit's view is that differential treatment, standing alone, is insufficient to merit close scrutiny under the Dormant Commerce Clause. According

to the Fifth Circuit, "the mere fact that a statute has the effect of benefitting a local industry while burdening a separate interstate industry does not in itself establish that the statute is discriminatory." 101 F.3d at 1102 (App. B, 15a). This statement, of course, is incongruous with the *Oregon Waste Systems* model of discrimination, which classifies all instances of differential treatment as discrimination. *Id.*, 114 S.Ct. at 1350. As if to justify its radical departure from this binding precedent, the Fifth Circuit emphasized the facial neutrality of Ordinance 259[5] and its status as simply a "land use" regulation (to be distinguished, presumably, from a purely protectionist measure). The Fifth Circuit's underlying rationale seems to be that, in the absence of protectionist intent, a statute which creates uneven effects in the marketplace should not be subjected to the same level of scrutiny as outright economic protectionism.[6]

This Court has never seen fit to draw a line between discrimination which is intended to be protectionist and discrimination which is without a protectionist purpose. This Court has assumed all along that even the "legitimate" exercise of the police power can produce protectionist effects, *see, e.g., Maine v. Taylor*, 477 U.S. 131 (1986), and, as a consequence, such measures are entitled to deferential review only if "there

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5. The Fifth Circuit found that Nederland's discrimination against HUD-code manufactured homes is not "affirmative" discrimination since all such homes, regardless of place of manufacture, are excluded. 101 F.3d at 1102 (App. B, 15a-16a). This Court has never accepted this type of defense as dispositive of the discrimination question. *See, e.g., Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353, 361 (1992); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n.4 (1951).

6. Discrimination must be justified under strict scrutiny, *see, e.g., Fulton Corp. v. Faulkner*, __ U.S. __, 116 S.Ct. 848, 861 (1996), whereas nondiscriminatory measures are analyzed under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

is no patent discrimination against interstate trade." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). To ascertain whether a statute produces protectionist effects, the critical inquiry is whether the statute operates to lessen competition in a given market between interstate and intrastate commerce. *See, e.g., General Motors Corporation v. Tracy*, 117 S.Ct. 811 (1997)(removal of the challenged regulation would not promote competition); *see also Toomer v. Witsell*, 334 U.S. 385, 403-04 (1948) (statute which "impose[s] an artificial rigidity on the economic pattern of the industry" is offensive).[7] By exempting "non-protectionist" discrimination from strict scrutiny, even though the effects it produces are the same as economic protectionism, the Fifth Circuit's approach undermines the effectiveness of the Dormant Commerce Clause by increasing the likelihood of regional jealousies and reprisals.

III.

WHERE THERE IS EVIDENCE OF A BURDEN ON INTERSTATE COMMERCE AND LESS BURDENSOME ALTERNATIVES TO ACHIEVE THE STATE'S PURPOSE, SUMMARY JUDGMENT IS INAPPROPRIATE TO DISPOSE OF A DORMANT COMMERCE CLAUSE CHALLENGE.

Another reason for granting the writ is to resolve a split among the courts of appeals in their approach to applying the undue burden test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), at the summary judgment level. The Seventh, Eighth, and Tenth Circuits acknowledge that the *Pike* test is fact-intensive and inappropriate for summary judgment. *See National*

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7. In Nederland, removing the ban on HUD-code manufactured homes would naturally increase competition in the residential housing market by offering a second, viable option to those consumers who desire to place a factory-built home on their privately-owned lots.

Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 1351 (1996); *Cotto Waxo Company v. Williams*, 46 F.3d 790 (8th Cir. 1995); *Blue Circle Cement, Inc. v. Board of County Commissioners, etc.*, 27 F.3d 1499 (10th Cir. 1994). On the other hand, the First, Fourth, Sixth, Ninth, and Eleventh Circuits, in addition to the Fifth Circuit's opinion in this case, have applied the *Pike* test to affirm summary judgments in favor of the challenged regulation. *See New Hampshire Motor Transport Ass'n v. Town of Plaistow*, 67 F.3d 326 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 1352 (1996); *Medical Waste Associates Limited Partnership v. Mayor and City Council of Baltimore*, 966 F.2d 148 (4th Cir. 1992); *Ferndale Laboratories, Inc. v. Cavendish*, 79 F.3d 488 (6th Cir. 1996); *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir.), *cert. denied*, 115 S.Ct. 2580 (1995); *Kirkpatrick v. Shaw*, 70 F.3d 100 (11th Cir. 1995).

The middle ground between these polar extremes seems most appropriate. Where there is no burden on interstate commerce, there is nothing to balance, and summary judgment is proper. This seems to be the approach of the Second and Third Circuits. *See Gary D. Peake Excavating, Inc. v. Town Bd. of Town of Hancock, N.Y.*, 93 F.3d 68 (2d Cir. 1996); *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 1176 (1995); *Old Bridge Chemicals, Inc. v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1295 (3d Cir.), *cert. denied*, 506 U.S. 1000 (1992) ("the regulations imposed no burden on interstate commerce").

On the other hand, where there is evidence of a burden on interstate commerce, the burden must be weighed according to the formula articulated in *Pike*. If all that *Pike* required was a balancing of the local and federal interests, courts would be free to decide as a matter of "policy" that the public interest outweighs the burden on interstate commerce, regardless of

magnitude and regardless of how well the challenged regulation furthers the public interest. *See, e.g., Electrolert Corp. v. Barry*, 737 F.2d 110 (D.C.Cir. 1984) (non-illusory safety regulations should not be balanced at all). *Pike*, of course, has a third element, which is that courts must take into account the availability of less burdensome measures the state could adopt to achieve its objectives. If the non-moving party fails to propose less burdensome alternatives, then, faced with only a balancing of competing interests, courts would still be free to make their policy decisions at the summary judgment level. If, however, evidence of less burdensome alternatives is offered by the non-moving party, and if the alternatives are not illusory, then the balancing takes on a "feasibility" dimension which reduces the "policy" aspects of the decision, and summary disposition under such circumstances is manifestly unjust. Accordingly, where there is evidence of a burden on commerce,[8] and where there is evidence of less burdensome alternatives,[9] the case should be allowed to proceed to trial.

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8. In the instant case, the district judge acknowledged that Ordinance 259 burdens interstate commerce, 905 F.Supp. at 379 (App. D, 45a) and 381 (App. C, 32a), and Petitioners quantified the burden ($943,000 in lost sales over a four-year period). The Fifth Circuit acknowledged the lost sales but found that, because Texas firms suffer proportionately in those losses, interstate commerce does not suffer a "net" loss, and therefore, there is no burden on interstate commerce. 101 F.3d at 1104 (App. B, 19a- 20a). The fact that Nederland's exclusion hurts Texas firms, however, does not dispose of the discrimination question. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353, 361 (1992); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n.4 (1951).

9. Petitioners introduced evidence of alternative methods of protecting property values other than the wholesale exclusion of HUD-certified manufactured housing, but this evidence was neither acknowledged nor considered by the district judge, 905 F.Supp. at 379 (App. D, 45a) and 381 (App. C, 32a), and it was deemed irrelevant by the Fifth Circuit because it found no burden on interstate commerce. 101 F.3d at 1104 (App. B, 19a-20a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 28, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40803

TEXAS MANUFACTURED HOUSING ASSOCIATION INC; A J WALLER, SR

Plaintiffs - Appellants

v.

NEDERLAND CITY OF; ZONING BOARD OF APPEALS, CITY OF NEDERLAND

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 12/26/96, 5 Cir., 1996, F.3d)

Before KING, HIGGINBOTHAM, Circuit Judges, and KAZEN,* District Judge.

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* District Judge for the Southern District of Texas, sitting by designation

Appendix A

PER CURIAM:

(x) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

* * *

ENTERED FOR THE COURT:

s/ Carolyn Dineen King
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED DECEMBER 26, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.; A.J. Waller, Sr., Plaintiffs-Appellants

v.

NEDERLAND, CITY OF; Zoning Board of Appeals, City of Nederland, Defendants-Appellees.

No. 95-40803.

United States Court of Appeals,
Fifth Circuit

Dec. 26, 1996

* * *

Appeals from the United States District Court for the Eastern District of Texas.

Before KING and HIGGINBOTHAM, Circuit Judges, and KAZEN,* District Judge.

KING, Circuit Judge:

Plaintiffs appeal a grant of summary judgment in favor of defendants on plaintiffs' multiple claims challenging a city

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* District Judge for the Southern District of Texas, sitting by designation.

ordinance that regulates the placement of manufactured housing[1] within city limits. Finding no genuine issues of material fact as to any of plaintiffs' claims, we affirm.

I. BACKGROUND

In 1970, the City of Nederland (the "City") adopted Ordinance 259, which prohibits the placement of "trailer coaches" on any lot within city limits except in a "duly authorized trailer park." Ordinance 259 defines "trailer coach" as "a transportable, single family dwelling unit which is or may be mounted on wheels suitable for year-round occupancy and containing the same water supply, waste disposal and electrical conveniences as immobile housing."

In 1994, A.J. Waller, Sr. ("Waller") applied to the City for a permit to place a "HUD-code manufactured home" on a lot that he had owned and occupied in Nederland since 1959. Under Texas law, a "HUD-code manufactured home" has characteristics identical to those of a mobile home except that a HUD-code manufactured home is built after June 15, 1976, and is constructed according to HUD standards. *See* Tex.Rev.Civ.Stat.Ann. art. 5221f § 3 (Vernon Supp. 1997).[2]

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1. In this opinion, the term "manufactured housing" refers collectively to "HUD-code manufactured homes" and "mobile homes," as those terms are defined under Texas law. *See infra* note 2.

2. The Manufactured Housing Standards Act provides in relevant part:

> Sec. 3. Whenever used in this Act, unless the context otherwise requires, the following words and terms have the following meanings:

(Cont'd)

Appendix B

Waller intended to install the home on a permanent foundation system. The home would have replaced an aging, dilapidated, site-built home that Waller was then occupying.

(Cont'd)

> (1) "Mobile home" means a structure that was constructed before June 15, 1976, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems.
>
> (17) "Manufactured housing" or "manufactured home" means a HUD-code manufactured home or a mobile home and collectively means and refers to both.
>
> (19) "HUD-code manufactured home" means a structure, constructed on or after June 15, 1976, according to the rules of the United States Department of Housing and Urban Development, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems. The term does not include a recreational vehicle as that term is defined by 24 C.F.R. Section 3282.8(g)

Tex.Rev.Civ.Stat.Ann. art. 5221f § 3 (Vernon Supp. 1997). These definitions of "mobile home" and "HUD-code manufactured home" track the federal definition of "manufactured home." *See* 42 U.S.C. § 5402(6).

Appendix B

The City determined that a HUD-code manufactured home was a "trailer coach" and denied Waller's application under Ordinance 259. Waller appealed to the Zoning Board of Appeals of the City of Nederland ("Zoning Board"). After a public hearing, the Zoning Board affirmed the City's denial of Waller's permit application.

The City and the Zoning Board have interpreted Ordinance 259 to include both HUD-code manufactured homes and mobile homes but not "industrialized" or "modular" homes. An "industrialized" or "modular" home is built off-site in modular components that are then transported to a residential site and erected on a permanent foundation.[3] Unlike manufactured housing, modular housing is not built on a permanent chassis

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3. "Industrialized housing" is defined under Texas law as:

> a residential structure that is designed for the use and occupancy of one or more families, that is constructed in one or more modules or constructed using one or more modular components built at a location other than the permanent residential site, and that is designed to be used as a permanent residential structure when the modules or modular components are transported to the permanent residential site and are erected or installed on a permanent foundation system. . . . The term shall not mean nor apply to (i) housing constructed of sectional or panelized systems not utilizing modular components; or (ii) any ready-built home which is constructed so that the entire living area is contained in a single unit or section at a temporary location for the purpose of selling it and moving it to another location.

Tex.Rev.Civ.Stat.Ann. art. 5221f-1 § 1(1) (Vernon 1987).

and must be constructed according to local building code standards. *See* Tex.Rev.Civ.Stat.Ann. art. 5221f-1 § 2 (Vernon 1987). The distinction between manufactured housing and modular housing is at the heart of plaintiffs' constitutional claims.

Waller and the Texas Manufactured Housing Association ("TMHA") (collectively, "plaintiffs") filed suit against the City and Zoning Board on June 29, 1994, challenging the enforcement of Ordinance 259 as discriminatory and unconstitutional. Plaintiffs claimed that defendants' actions amounted to a constitutional tort as well as a denial, under the United States Constitution, of substantive due process, equal protection, just compensation, privileges and immunities, and privacy. Plaintiffs also claimed that enforcement of Ordinance 259 impermissibly burdened interstate commerce and that both federal and state law preempted the subject matter of the ordinance. Plaintiffs sought relief for alleged constitutional violations both directly and under 42 U.S.C. § 1983.

On September 7, 1995, the district court granted summary judgment in favor of defendants on all claims. The district court denied plaintiffs' motion for reconsideration.

On appeal, plaintiffs argue that the district court erred in granting summary judgment for defendants on plaintiffs' preemption, commerce clause, takings, substantive due process, equal protection, and § 1983 claims, and in granting defendants' motion to extend time for filing a motion for attorneys' fees.

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo, applying the same criteria used by the district court in the first instance.

Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994); *Conkling v. Turner*, 18 F.3d 1285, 1295 (5th Cir. 1994). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). After the movant has presented a properly supported motion for summary judgment, the burden shifts to the nonmoving party to show with "significant probative evidence" that there exists a genuine issue of material fact. *See Conkling*, 18 F.3d at 1295. A fact is "material" if its resolution in favor of one party might affect the outcome of the lawsuit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Id.*

III. DISCUSSION

A. *Preemption*

1. *Federal preemption*

The doctrine of federal preemption is rooted in the Supremacy Clause and activated by congressional intent. *See Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). Congress may either expressly define the extent to which state law is to be preempted by a federal statute, or implicitly preempt state law by regulating comprehensively so as to preclude state law from occupying any part of the regulated field. *Id.* Even

where Congress has not entirely regulated a specific area, state law will be nullified to the extent it directly conflicts with federal law or hinders achievement of congressional objectives. *Id.; see also Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 860, 363 (5th Cir. 1995).

Plaintiffs argue that Ordinance 259 is preempted by the National Manufactured Housing Construction and Safety Standards Act of 1974 (the "Act"), 42 U.S.C. §§ 5401-5426, which expressly prohibits state and local governments from establishing standards for the safety and construction of manufactured homes that differ from federal standards. *See* 42 U.S.C. § 5403(d).[4] Plaintiffs base their argument on isolated portions of testimony of City officials that purportedly establish that a HUD-code manufactured home would not be an acceptable structure on a private residential lot outside a trailer park because such a home would not comply with the "local building

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4. This section provides:

> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

42 U.S.C. § 5403(d).

code."[5] Plaintiffs contend that this testimony raises a fact issue concerning whether Ordinance 259 imposes local safety and construction standards on HUD-code manufactured homes in contravention of the express will of Congress.

Plaintiffs rely on *Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988), in which a permit to place a HUD-code manufactured home in one of the city's residential districts was denied because a local ordinance prohibited the placement in such a district of any home that did not comply with specified local codes. *Id.* at 1522-23. The Eleventh Circuit held that the ordinance was preempted because it attempted to impose greater safety requirements for manufactured homes than those mandated by the federal statute. *Id.* at 1525.

We agree with the district court that this case is significantly unlike *Scurlock*. The ordinance at issue in *Scurlock* excluded from certain residentially-zoned property any home that either did not meet the Southern Standard Building Code, the National Electrical Code, and the Electrical Code of the City of Lynn Haven, or did not bear the seal of the Florida Department of Community Affairs. As recognized by the Eleventh Circuit, the City of Lynn Haven was "attempting to exclude the Scurlock's mobile home from its R-AA section based *solely* on its safety code." *Id.* (emphasis added). Accordingly, much of the evidence at trial concerned the differences between HUD requirements

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5. "Local building code" is the term that plaintiffs use in their brief. The depositions relied on by plaintiffs include various references to "local building code," "Standard Building Code," and "Southern Building Code." Plaintiffs do not define these terms. However, because plaintiffs frame their argument using the term "local building code," we use this term in our discussion. We suggest no view as to the distinctions that may or may not exist among the various terms.

and those contained in the specified codes. *Id.* at 1523. Ordinance 259, in contrast, regulates the placement and permitting of trailer coaches for the purpose of protecting property values and does not expressly link its provisions in any way to local safety and construction standards.

In *Scurlock,* the evidence showed that a HUD-code home would be permitted in the areas in question as long as it complied with local safety and construction codes (which imposed requirements different from and more stringent than HUD requirements), *irrespective of any other applicable local regulations.* The evidence in this case does not establish this specific, key fact. Plaintiffs have not cited evidence that identifies the actual requirements of the "local building code" that HUD-code manufactured homes fail to satisfy under the ordinance. This omission is fatal to plaintiffs' claim that the ordinance is a thinly veiled attempt to impose local safety and construction standards on HUD-code manufactured homes. The relevant deposition testimony, taken as a whole, does not distinguish between local safety and construction standards and all other aspects of local building regulation (including the ordinance at issue in this case). Therefore it does not create a genuine issue of material fact as to whether enforcement of Ordinance 259 conflicts with federal law. The district court properly granted summary judgment on plaintiffs' federal preemption claim.

2. *State preemption*

Plaintiffs also argue that Ordinance 259 is preempted by the Texas Manufactured Housing Standards Act, Tex. Rev.Civ.Stat.Ann. art. 5221f. This statute specifically allows cities to restrict installation of HUD-code manufactured homes to "areas determined appropriate by the city."

Tex.Rev.Civ.Stat.Ann. art. 5221f § 4A(b) (Vernon Supp. 1997). Plaintiffs contend, however, that Ordinance 259 is preempted by section 3A of article 5221f because Ordinance 259 treats the terms "HUD-code manufactured home" and "mobile home" "as functional equivalents under the outdated (1970) rubric of 'trailer coach,' " whereas section 3A provides that the terms are mutually exclusive and binding on every political subdivision in Texas.

Plaintiffs are correct that section 3A makes the definitions of manufactured housing contained in article 5221f binding on all local political subdivisions of the state. Section 3A also states that "[a] mobile home is not a HUD-code manufactured home and a HUD-code manufactured home is not a mobile home for any purpose under the laws of this state." Tex.Rev.Civ.Stat.Ann. art. 5221f § 3A (Vernon Supp. 1997). Nothing in article 5221f, however, precludes a municipality from regulating both types of manufactured housing using a single term such as "trailer coach." Ordinance 259 does not impermissibly regulate either mobile homes or HUD-code manufactured homes, and the district court properly granted summary judgment on the state preemption claim.

B. *Commerce Clause*

The dormant commerce clause confines the states' power to burden interstate commerce. *Oregon Waste Sys., Inc. v. Oregon Dep't Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). The first step in analyzing the constitutionality of legislation under the dormant commerce clause is to determine "whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical

effect." *Hughes v. Okla.*, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979); *see also Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986). The Supreme Court has defined "discrimination" in this context to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems*, 511 U.S. at __, 114 S.Ct. at 1350. As the Court has alternatively formulated this initial step, "[t]he crucial inquiry . . . must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978).

A statute that burdens interstate commerce only incidentally is subject to the flexible balancing approach of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), which provides that such a statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142, 90 S.Ct. at 847. The *Pike* Court went on to state that "[i]f a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

Statutes that affirmatively discriminate against interstate commerce are subject to stricter scrutiny. The party challenging the statute bears the initial burden of showing discrimination. *Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736. Once discrimination has been demonstrated, the burden shifts to the state to

demonstrate both that the statute serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means. *Id.*

Plaintiffs argue that the district court erred in applying the balancing test set forth in *Pike* because Ordinance 259 discriminates against interstate commerce in its practical effect and therefore should have triggered strict scrutiny under *Hughes.* Plaintiffs contend that HUD-code manufactured housing is an out-of-state economic interest because many such homes are fabricated outside of Texas and imported into the state, while modular housing is an in-state economic interest because the modular homes that are sold to Texas consumers are constructed in Texas. Plaintiffs offered the affidavit of their expert, Will Ehrle, President and General Counsel of TMHA, who stated that because modular housing must meet the state building code and because of "practicalities of the market," the construction and sale of modular housing is, at least in Texas, a "distinctly local industry." Ehrle further stated that he was not aware of any manufacturer outside of Texas that sells and ships modular homes to Texas. Based on these facts, Plaintiffs contend that Ordinance 259 discriminates against interstate commerce because it prohibits the placement of HUD-code manufactured homes on individual, privately-owned lots in the City while permitting modular homes, which compete in an overlapping market, to be placed on such lots. Plaintiffs argue that an in-state economic interest is thereby benefited while an out-of-state economic interest is burdened.

The facts of this case most closely resemble those of *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981), cited by defendants. In *Clover Leaf,* the Supreme Court upheld a Minnesota statute banning retail

sale of milk in plastic nonreturnable, nonrefillable containers, but permitting sale in other nonreturnable, nonrefillable containers, such as paperboard cartons. The purpose of the statute was to promote conservation and ease solid waste management problems. Plaintiff dairy companies argued that the statute impermissibly burdened interstate commerce because the plastic resin used to make the plastic containers was produced entirely by out-of-state firms, while pulpwood, used to make the paperboard milk cartons that would replace the banned plastic containers, was a major in-state product. The statute effectively burdened the non-Minnesota plastic resin manufacturers while providing a boon to the Minnesota pulpwood industry. The Court held, first, that the statute did *not* discriminate against interstate commerce but regulated evenhandedly because it prohibited *all* milk retailers from selling their products in plastic, nonreturnable containers, without regard to whether the milk, the containers, or the sellers were from outside the state. The Court therefore applied the *Pike* balancing test and held, second, that the burden imposed on interstate commerce was relatively minor and not clearly excessive in light of the "substantial" state interest in promoting conservation and easing solid waste disposal problems.[6] 449 U.S. at 472-73, 101 S.Ct. at 728-29.

Clover Leaf thus stands for the proposition that the mere fact that a statute has the effect of benefitting a local industry while burdening a separate interstate industry does not in itself establish that the statute is discriminatory. *Clover Leaf* supports defendants' position that Ordinance 259 does not affirmatively

6. The Court so held despite state district court findings, based on extensive evidentiary hearings, that the statute would not be able to achieve its stated policy objectives and that the actual basis for the statute was to promote local economic interests in the dairy and pulpwood industries. The Court examined the record and drew contrary conclusions from the evidence.

discriminate because it treats HUD-code manufactured homes built in state identically to those built out of state.

In another relevant case, *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), the Court upheld a Maryland statute providing that producers or refiners of petroleum products may not operate any retail service station within the state. The purpose of the statute was to correct inequities in the distribution and pricing of gasoline. Because no producers or refiners operated within the state, the burden of the regulation fell entirely on interstate companies. The Court rejected the argument that this fact established that the statute discriminated against interstate commerce, reasoning that the in-state independent dealers were still subject to competition from out-of-state petroleum marketers that owned and operated retail gas stations but did not produce or refine petroleum and therefore were not bound by the statute. Because the statute did not erect barriers against interstate independent dealers and did not prohibit the flow of interstate goods, place added costs on them, or distinguish between in-state and out-of-state companies in the retail sector, the Court held that it had no discriminatory effect. *Id.* at 126, 98 S.Ct. at 2214.

In contrast to the facts of *Clover Leaf* and *Exxon*, in which the benefitted industry did not exist solely within the regulating state, plaintiffs contend that modular housing that could potentially serve the Nederland market originates solely within Texas. Plaintiffs' evidence on this point is limited to the Ehrle affidavit, noted above. Defendants apparently offered no evidence in response. The City's amici, however, note in their brief that the Texas statute regulating modular housing,[7]

7. The present statute uses the term "industrialized" for what we refer to as "modular" housing.

Appendix B

Tex.Rev.Civ.Stat.Ann. art. 5221f-1 (Vernon Supp. 1997), specifically contemplates the interstate sale and installation of modular homes. Section 4(c) of article 5221f-1 expressly permits the state commissioner of licensing and regulation to authorize building inspections of modular housing constructed in another state to be performed by an inspector counterpart in the other state and also to authorize inspections of modular housing that is constructed in Texas for use in another state. This provision is not inconsistent with Ehrle's affidavit testimony, which does not foreclose the possibility that modular housing could be constructed out of state and installed in state.[8]

Section 2(a) of article 5221f-1, moreover, requires that modular housing meet the requirements of the National Electrical Code and the requirements of whichever of two specified uniform building codes (the Uniform Building Code and the Standard Building Code) has been adopted by the municipality in which the housing is erected or installed. Section 2(b) provides that if the municipality has not adopted either of the specified codes, or if the housing is created or installed outside a municipality, the housing must be constructed in accordance with whichever of the two codes the manufacturer chooses. These provisions tend to erode plaintiffs' argument that modular housing is a "distinctly local industry" in part because it must conform to a local building code; in this context, the local code must itself conform to certain standards used throughout the nation.

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8. We note that the City of Nederland is within close proximity to the Louisiana border and a major interstate highway. Presuming that transportation is a relevant "practicality of the market," it is not at all implausible that modular housing constructed in Louisiana could be transported to Nederland at least as conveniently as modular housing constructed elsewhere in Texas.

Appendix B

Plaintiffs' attempt to demonstrate that Ordinance 259 has a discriminatory, rather than incidental, effect on interstate commerce is flawed in two respects. First, Ordinance 259 does *not* place any restrictions on out-of-state modular housing, and plaintiffs' evidence, even accepted as true as it must be here, does not show that modular housing is inherently such that it cannot be sold interstate. To the contrary, interstate sale of modular homes was expressly contemplated by the state legislature, and the potential for significant variations among local building codes throughout the state is minimal. Because Ordinance 259 creates no barriers to the free flow of modular homes to and from Texas, the facts of this case mirror those of *Clover Leaf* and *Exxon*.

Second, plaintiffs' own evidence demonstrates that the markets for modular homes and for HUD-code manufactured homes, though overlapping, are basically distinct. Ehrle stated in his affidavit that HUD-code manufactured homes are generally less expensive than modular homes and represent the only viable option for home ownership for those who cannot afford a modular home. As persuasive as Ehrle's political argument may be to sympathetic policymakers, it precludes a conclusion by this court that, because it will result in a higher proportion of in-state goods than out-of-state goods in the market, it has a discriminatory effect. There are two markets at work, and plaintiffs have not presented evidence demonstrating that a restriction on HUD-code manufactured homes will result in a corresponding increase in sales of modular homes. In other words, plaintiffs have not presented evidence that the two types of housing are substitutes, despite their argument that distinguishing between them for purposes of maintaining property values is irrational and ineffective.

Appendix B

Because Ordinance 259 has only an incidental effect on interstate commerce, the district court was correct to apply the balancing test outlined in *Pike*. Plaintiffs contend that the ordinance fails this test because the burden on interstate commerce is clearly excessive to the local interest served. In support, plaintiffs cite lost sales of HUD-code manufactured homes in the City during the 1991-94 period of over $900,000. Plaintiffs also contend that the City has not demonstrated that preserving property values is a legitimate governmental interest, that the ordinance does not actually achieve the stated objective,[9] and that rather than impose an outright ban on all HUD-code manufactured homes not placed in trailer parks, the City could have adopted the less restrictive alternative of requiring that such homes comply with certain aesthetic requirements.

We conclude that plaintiffs have not produced evidence sufficient to create a genuine issue of material fact with respect to whether the burden on interstate commerce clearly exceeds the local benefits. It is not evident that plaintiffs have

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9. Plaintiffs rely on Ehrle's affidavit testimony that mobile homes have dramatically improved in quality and appearance and that "numerous studies" of the impact of manufactured housing on land values have concluded that property values are not diminished by adjacent HUD-code manufactured housing. It appears, however, that plaintiffs offered no such actual studies. Plaintiffs did produce the report of one appraiser who concluded that the placement of a HUD-code manufactured home on Waller's lot would not adversely affect surrounding property values. The City countered with the affidavit of another appraiser, who stated that the presence of a mobile home or HUD-code manufactured home in a residential neighborhood of conventional site-built homes does have a negative impact on property values. The City's appraiser also stated that Fannie Mae guidelines require that when appraising a conventional site-built home, an appraiser mention in the report the presence of any mobile homes or HUD-code manufactured homes in the neighborhood.

demonstrated a *burden* on interstate commerce at all. The ostensible burden consists of lost sales of HUD-code manufactured homes manufactured by out-of-state firms for placement on individual, privately-owned lots in the City of Nederland. In-state counterpart firms will suffer proportional losses. As the Supreme Court stated in *Exxon*, "the [Commerce] Clause protects the interstate *market*, not particular interstate firms, from prohibitive or burdensome regulations." 437 U.S. at 127-28, 98 S.Ct. at 2214-15 (emphasis added). Plaintiffs have not demonstrated that whatever mode of housing is built in lieu of HUD-code manufactured homes, it will be provided by in-state suppliers. Because plaintiffs have not raised a genuine issue as to whether any burden the ordinance may impose on interstate commerce is clearly excessive to the local benefits,[10] the district court did not err in granting summary judgment on this claim.

C. *Takings*

The authority of state and local governments to enact land use restrictions has long withstood constitutional scrutiny. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). Such authority is not,

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10. There can be no dispute that the governmental interest at stake is legitimate. Maintenance of property values has long been recognized as a legitimate objective of local land use regulation, and the Texas Supreme Court has expressly held that a local ordinance regulating the location of mobile homes is a land use ordinance properly within the local police powers. *See City of Brookside Village v. Comeau*, 633 S.W.2d 790 (Tex.), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982).

however, without limits. Pursuant to the Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, a land use regulation constitutes a taking if the ordinance "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) (citations omitted); *see also Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).[11]

In holding that Ordinance 259 does not constitute a compensable taking, the district court reasoned that even if the ordinance precluded the economically optimal use of Waller's land, it neither deprived him of any fundamental attributes of property ownership nor prevented him from making beneficial use of the property. We agree that plaintiffs have not made an evidentiary showing sufficient to create a genuine issue as to the existence of a taking.

Plaintiffs contend that the district court erred in its takings analysis because (1) it improperly "found" that Waller had not been deprived of all economically viable use of his property and (2) it applied the wrong legal standard. Plaintiffs argue that the district court should have applied "heightened scrutiny," under *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107

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11. The exception to this formulation is the category of *per se* takings, such as a permanent physical occupation of the property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), or deprivation of *all* economically beneficial use, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Plaintiffs do not contend that Ordinance 259 constitutes a *per se* taking.

S.Ct. 3141, 97 L.Ed.2d 677 (1987), because the City disproportionately singled out Waller. Plaintiffs contend that under *Nollan,* the ordinance cannot stand because it impermissibly attempts to "extract benefits" from the regulation of Waller's land and because it lacks the requisite "closeness of fit" between means and ends. Plaintiffs make no argument and cite no evidence concerning the harm to Waller, other than to state that such harm is "obvious."

The evidence before the court in no way indicates that Waller has been singled out as was the landowner in *Nollan.* Ordinance 259 is a general zoning regulation that applies evenhandedly to entire areas of the City, unlike the challenged requirement in *Nollan* that conditioned a building permit upon the applicant's granting of an uncompensated, permanent, public access easement to the city. *Id.* at 828, 107 S.Ct. at 3143; *see also Dolan,* 512 U.S. at __, 114 S.Ct. at 2316 (distinguishing *Nollan* and *Dolan* from land use cases in which the regulations involve "essentially legislative determinations classifying entire areas of the city"). The Nederland ordinance does not "extract benefits" from Waller in the *Nollan* sense of requiring some dedication of property to the city. Accordingly, even assuming that *Nollan* establishes a distance standard in cases of constitutionally suspect conditions, this is not such a case.

We therefore turn to the first question posed under *Agins* — whether Ordinance 259 substantially advances a legitimate state interest. *Agins,* 447 U.S. at 260, 100 S.Ct. at 2141. Ordinance 259 restricts the placement of manufactured housing inside the City's limits to trailer parks in an effort to prevent haphazard placement of such housing throughout the City and thereby prevent a concomitant decline in property values. Conservation of property values is a legitimate governmental interest well

within the broad scope of the police power. *See Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954); *Corn v. City of Lauderdale Lakes,* 997 F.2d 1369, 1375 (11th Cir. 1993), *cert. denied,* __ U.S. __, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994). Ordinance 259, moreover, substantially advances this interest. Here, the City determined that manufactured housing would detrimentally affect property values if scattered throughout a municipality. Restricting manufactured housing to trailer parks directly responds to this legitimate concern.

We must now determine whether enforcement of the ordinance interferes with Waller's reasonable use of his property to such a degree as to constitute a taking. This is necessarily a fact-intensive, case-by-case inquiry that takes account of such relevant factors as the extent to which the regulation frustrates distinct investment-backed expectations and whether it completely denies all beneficial use of some portion of the property. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124-28, 98 S.Ct. 2646, 2659-61, 57 L.Ed.2d 631 (1978). In many contexts, some adverse effect on economic value will be tolerated in the interest of promoting the health, safety, welfare, or morals of a community. *Id.* In this case, plaintiffs have made no showing of harm sufficient to declare enforcement of Ordinance 259 a taking. Plaintiffs have alleged neither physical invasion nor interference with distinct investment-backed expectations, and the evidence fails to show not only a deprivation of all beneficial use of any part of Waller's property, but also any diminution in the property's value. Summary judgment was therefore appropriate on this claim.

Appendix B

D. *Substantive Due Process*

The relevant inquiry for plaintiffs' substantive due process challenge is whether there existed a rational basis for the City's enactment and enforcement of Ordinance 259. *Shelton v. City of College Station,* 780 F.2d 475, 482 (5th Cir.) (en banc) ("We hold that the outside limit upon a state's exercise of its police power and zoning decisions is that they must have a rational basis."), *cert. denied,* 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566, *and cert. denied,* 479 U.S. 822, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986). An attack against a zoning decision can succeed only with a showing " 'that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " *Id.* at 479 (quoting *Vance v. Bradley,* 440 U.S. 93, 110-11, 99 S.Ct. 939, 949-50, 59 L.Ed.2d 171 (1979)). Plaintiffs concede that the exercise of the police power does not offend due process unless the challenged legislation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid,* 272 U.S. at 395, 47 S.Ct. at 121. Plaintiffs nevertheless contend that the purported rational basis for enacting Ordinance 259 is merely a pretext to mask arbitrary and capricious action that renders the Ordinance unconstitutional. Because it is "at least debatable" whether restricting the placement of mobile homes effectively maintains property values, the district court properly granted summary judgment on this claim. *See Shelton,* 780 F.2d at 483; *Clover Leaf,* 449 U.S. at 464, 101 S.Ct. at 723.

E. *Equal Protection*

Plaintiffs argue that the district court erred in applying the rational basis test to their equal protection claim. Relying on

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459-460, 105 S.Ct. 3249, 3264-65, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring in part and dissenting in part), plaintiffs propose that a higher standard of review is appropriate whenever noneconomic or noncommercial legislation affects rights of weighty societal importance. Short of suggesting that housing is a fundamental right, plaintiffs contend that heightened scrutiny is appropriate in this case because property rights are at stake.

We decline to expand the established parameters of heightened scrutiny. Because this case does not involve a suspect or quasi-suspect classification such as race or sex to which heightened scrutiny properly applies, the Equal Protection Clause requires only rationality review.

Rationality review in this context requires merely that the classification drawn by the statute be rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981). The distinction made by Ordinance 259 between trailer coaches and other forms of housing meets this test. The district court did not err in granting summary judgment to defendants on this claim.

F. *42 U.S.C. § 1983*

Section 1983 affords a private cause of action to any party deprived of a constitutional right under color of state law. *See* 42 U.S.C. § 1983. Plaintiffs contend that the district court erred in dismissing their claims under § 1983 pursuant to its grant of summary judgment on all other claims. Having concluded that the district court did not err in granting summary judgment on plaintiffs' constitutional claims, we hold that its dismissal of claims under § 1983 was proper.

Appendix B

G. *Motion to Extend Time*

Finally, plaintiffs argue that because defendants did not file their motion to extend the time for filing a motion for attorneys' fees until after the period of time for filing such a motion had already expired, the district court's grant of defendants' motion was improper. Defendants contend that the granting of a motion to extend time for filing a claim for attorneys' fees is within the discretion of the district court and that plaintiffs were not prejudiced by the late filing because plaintiffs did receive notice of the claim in time to appeal.

Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure provides that "[u]nless otherwise provided by statute or order of the court, the motion [for attorneys' fees] must be filed and served no later than 14 days after entry of judgment." Rule 6 provides that the district court for cause shown may, in its discretion, grant an extension after the expiration of a specified time period if the failure to timely file was the result of excusable neglect. The record in this case discloses no evidence of abuse of discretion.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION ENTERED OCTOBER 16, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. 1:94-CV-398

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Plaintiffs,

VS.

CITY OF NEDERLAND, and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Defendants.

MEMORANDUM OPINION

The Plaintiffs' Motion for Reconsideration asks this court to vacate its summary judgment order of September 7, 1995. Plaintiffs, A.J. Waller and Texas Manufactured Housing Association, Inc., brought this court action alleging various causes of action arising from the City of Nederland's adoption of a 1970 zoning ordinance ("Ordinance 259"). This court reaffirms its finding that Ordinance 259 is a valid exercise of the local police power of the City of Nederland and is not otherwise unlawful as a violation of the plaintiffs' constitutional rights.

Appendix C

Plaintiffs had initially alleged over ten different violations of federal, state, and constitutional law. In this Motion to Reconsider they have re-urged two issues in particular. First, the plaintiffs repeat their contention that the National Manufactured Housing and Safety Standards Act of 1974, 42 U.S.C. §§ 5401-5426, preempts Ordinance 259. Second, the plaintiffs implore the court to "get it right" in regard to its dormant commerce clause analysis. After due consideration of plaintiffs' counsel's florid language on the preemption and dormant commerce clause issues, this court holds that Ordinance 259 does not violate the National Manufactured Housing and Safety Standards Act nor the commerce clause.

I. Alleged Federal Preemption

A. The Use of Faulty Syllogisms

The plaintiffs attempt to show this court by a simplistic syllogism that the court ignored their irrefutable logic. However, the so-called syllogism is erroneous because both the major and minor premises are faulty and not germane to this court's original analysis. The plaintiffs attempt to set up the straw man and, by destruction of the straw man, achieve their desired result. It does not work.

The two presumptions ascribed to the defendants are conveniently numbered in the plaintiffs' motion. Number one is "that the outward appearance of manufactured housing renders it incompatible with 'conventional' housing." Number two is "that mixing visually compatible and incompatible uses of property drives down the value of the former." The summary judgment order in no way relied on these premises.

Rather, this court found that the rationale for Ordinance 259 was the preservation of property values. There are a number of reasons why property values were thought to be jeopardized by mobile homes scattered about the city. The most potent one, however, centered on the very nature of mobile homes (*viz.*, they are mobile). It is not, then, that mobile homes look different or are structurally inferior to stationary homes. It is, instead, that there is a belief on the part of some property owners and the city council that mobile homes reduce land value. What consumers believe is what the market produces. Any policy which the officials could have reasonably believed to be in the best interests of the city will not be disturbed. In the case at bar, safety was not a factor in the adoption of Ordinance 259, let alone its "sole basis" for enactment. *Cf. Scurlock v. City of Lynn Haven*, 858 F.2d 1521, 1515 (11th Cir. 1988).

B. Obfuscation and Trick Questions

A second reason why summary judgment is opposed by the plaintiffs is prompted by an alleged fact question. Plaintiffs assert that the motive of the responsible city officials, as developed in the record, is a question for the trier of fact. Specifically, the plaintiffs point to depositions wherein city officials acceded that a home which was built in accordance with the Southern Building Code would be permissible outside of trailer parks. This is sophistry. There were a number of different points made during the relevant depositions cited by the plaintiffs, but the meat of these soliloquies ran along these lines:

> Plaintiff's Counsel (PC): Would you allow HUD-code manufactured homes outside of trailer parks in Nederland?

Appendix C

City Official (CO): No, that would violate Ordinance 259.

PC: Why do you have Ordinance 259?

CO: Because the mobility of HUD-code manufactured homes can reduce the value of surrounding property if they are not properly zoned.

PC: If a HUD-code manufactured home was constructed to the specifications of the Southern Building Code, would that home be allowed outside of trailer parks in Nederland?

CO: I don't understand.

PC: If a HUD-code manufactured home was constructed like a site-built or modular home, would it be regulated by Ordinance 259?

CO: I guess not.

The plaintiffs point to this type of "evidence" to prove that Ordinance 259 meant to regulate "safety and construction" standards. This sophistry is clever, but not determinative. The fact is that any mobile home which was built to the Southern Building Code would no longer be mobile. Hence, property values would not be jeopardized. It is not that the hypothetical homes are built to the Southern Building Code which makes their location permissible, but rather that they are not mobile. The manner in which the plaintiffs' counsel worded the

questions, however, did not give the witnesses the opportunity to evade his insincere web. The plaintiffs' ability to obfuscate issues in the record does not manufacture issues of fact.

Although one could continue to explain precisely why the record does not support a finding that Ordinance 259 regulates safety, this court is mindful of the exponential growth of the Federal Reporter and Federal Supplement. That said, this court incorporates the findings made in its Memorandum Opinion of September 7, 1995. Ordinance 259 is by no means a "disguised" attempt to regulate the safety or construction of HUD-code manufactured homes. Hence, Ordinance 259 does not violate the National Manufactured Housing and Safety Standards Act of 1974.

II. Alleged Violation of the Dormant Commerce Clause

Plaintiffs' counsel does not mince words when he pronounces in no uncertain terms that "this Court's application of the law was manifestly incorrect." Without apology, I disagree with learned counsel.

"The limitation imposed by the Commerce Clause 'is by no means absolute' and 'the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L. Ed.2d 110 (1985). There are two different standards which the Supreme Court has promulgated for courts evaluating legislation under the dormant commerce clause. *Id.* One standard applies where legislation affirmatively discriminates against interstate commerce, while the other standard applies where the legislation burdens interstate commerce incidentally.

Where, as here, the ordinance in question does not directly discriminate on the basis of interstate commerce, this court is directed by *Pike v. Bruce Church* to apply a balancing test. 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). Ordinance 259 regulates evenhandedly with only incidental effects on interstate commerce. The burden on interstate commerce is not excessive in relation to the important local interests served by the ordinance. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). *See also Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir. 1992) (finding that the person challenging an ordinance that regulates evenhandedly bears the burden of showing that the burden on commerce is excessive).

CONCLUSION

The plaintiffs invite this court to re-sculpt the contours of federal constitutional law. Specifically, they wish this court to overrule Supreme Court cases in literally half a dozen areas of jurisprudence. A representative sampling of these cases includes *Pike v. Bruce Church*, *Euclid v. Ambler Realty Company*, 272 U.S. 265, 47 S.Ct. 114, 71 L.Ed. 303 (1926), *Vance v. Bradley*, 440 U.S. 93, 110-11, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979), *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d (1966), *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), and *Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976). This court declines the plaintiffs' invitation.

SIGNED this 9th day of October, 1995.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ENTERED OCTOBER 16, 1995

NO. 1:94-CV-398

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Plaintiffs,

VS.

CITY OF NEDERLAND, and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Defendants.

ORDER

Before the court is the Plaintiffs' Motion for Reconsideration. After considering the Motion, and in accordance with the Memorandum Opinion of this date, this court DENIES said Motion.

SIGNED this 9th day of October, 1995.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION ENTERED SEPTEMBER 7, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. 1:94-CV-398

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Plaintffs,

VS .

CITY OF NEDERLAND, and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Defendants.

MEMORANDUM OPINION

Before this court is the City of Nederland and the Zoning Board of Appeals of the City of Nederland's Motion for Summary Judgment. Plaintiffs, A.J. Waller and Texas Manufactured Housing Association, Inc., brought this court action alleging approximately a dozen causes of action arising from the City of Nederland's adoption of a 1970 zoning ordinance ("Ordinance 259"). Plaintiffs charge Defendants with various Constitutional torts as well as with denying Plaintiffs of both substantive and procedural due process, equal protection, just compensation, privileges and immunities, and privacy. Plaintiffs also claim that both federal and state law has

preempted the subject matter of Ordinance 259. For the reasons stated below, this court finds that Ordinance 259 is a valid exercise of the local police power of the City of Nederland and is not otherwise unlawful as a violation of Plaintiffs' constitutional rights. This court is not convinced by the Defendants' claim that res judicata should bar Mr. Waller or this suit from proceeding due to the previous resolution by Final Order of the state court litigation. In any event, summary judgment for the defendants is warranted on the merits of this dispute. Therefore, this court GRANTS the Defendant's Motion for Summary Judgment and DISMISSES the Plaintiffs' claims against the Defendants.

I. BACKGROUND

Texas Manufactured Housing Association, Inc. ("Texas Housing") and Mr. Waller brought suit to invalidate Nederland's alleged discriminatory and unconstitutional zoning ordinance which restricts the placement of mobile homes to limited areas within the city. Plaintiffs' complaint alleges that Ordinance 259 violates the Fifth and Fourteenth Amendments of the Constitution; the National Manufactured Housing and Safety Standards Act of 1974, 42 U.S.C. §§ 5401-5426; and the Texas Manufactured Housing Standards Act, Article 5221f, Tex.Rev. Civ.Stat. Plaintiffs further contend Ordinance 259 impermissibly burdens interstate commerce causing Texas Housing to incur damages.

In 1970, the City of Nederland adopted Ordinance 259 which regulates the placement and installation of "trailer coaches" within the city limits. In 1991, Mr. Waller applied for a permit to install a HUD-code manufactured home (this is the term used for a mobile home manufactured to HUD standards) on his private property. In 1992, Mr. Waller again applied for a

building permit to install a HUD-code manufactured home on his property. Both requests were denied. Subsequently, Waller brought a state court action against the City of Nederland. On April 15, 1994, the 136th Judicial District Court of Texas issued an order stating that the City of Nederland was entitled to enforce its ordinances as long as those ordinances did not conflict with the Texas Act.

On April 18, 1994, Mr. Waller once again applied for a permit to install a HUD-code manufactured home. In denying the request, Nederland's Building Official was of the opinion that a HUD-code manufactured home was considered a trailer coach, and, therefore, should not be permitted under Ordinance 259. Mr. Waller then filed an appeal with the Zoning Board of Appeals of the City of Nederland. The Zoning Board also denied his request. Mr. Waller, along with Texas Housing, then initiated suit in this court seeking damages and injunctive relief enjoining Nederland from enforcing Ordinance 259. Jurisdiction over this matter is conferred by the operation of 28 U.S.C. sections 1331 and 1343(a).

II. ANALYSIS

A. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the moving party is able to demonstrate that the pleadings, depositions, affidavits, and other appropriate evidence available to the court establish that there are no genuine issues of material fact and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Matsushita Electric*

Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-88, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). There are no genuine issues of material fact "[w]here the record taken as a whole could not lead a rational trier of fact to find for a non-moving party . . . ." *Leonard v. Dixie Well Service Supply, Inc.*, 828 F.2d 291, 293-94 (5th Cir. 1987).

This court views the evidence and all factual inferences from that evidence in the light most favorable to the party opposing summary judgment. *Eastman Kodak v. Image Technical Services*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2077, 119 L.Ed.2d 265 (1992); *Matsushita*, 475 U.S. at 487, 106 S.Ct. at 1356.

B. THE PREEMPTION CLAIMS

The Plaintiffs claim that Ordinance 259 encroaches upon an area expressly preempted by both federal and state law. Because the statutory language in question differs somewhat, each statute will be discussed in turn.

1. The Federal Act

The lines of inquiry are identical whether it be either state statute or local ordinance which is being scrutinized against the preemptive force of federal law. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638, 93 S.Ct. 1854, 1862, 36 L.Ed.2d 547 (1973). Federal preemption analysis is foremost an exercise in enforcing the Supremacy Clause. The reach of the federal action in question is determined by congressional intent regarding statutory construction. *Gushke v. City of Oklahoma City*, 763 F.2d 379, 383 (10th Cir. 1985). Congress can make it easy to recognize how much, if any, state law is to be preempted through the use of express preemptive language.

Appendix D

Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed.2d 199 (1984). Express preemptive language may be found on the face of a statute, in its legislative history, or in regulations promulgated pursuant to the law. *Howard v. Uniroyal, Inc.*, 710 F.2d 1552, 1556 (llth Cir. 1983). Preemptive intent may also be inferred when Congress legislates comprehensively, thus occupying an entire field of regulation, or when state law actually conflicts with federal law thereby standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Michigan Canners*, 467 U.S. at 169, 104 S.Ct. at 1523.

The preemptive intent of Congress for the National Manufactured Housing and Safety Standards Act is expressly set out in section 5403(d) of the Act itself:

> Whenever a Federal [mobile] home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have authority either to establish, or to continue in effect, with respect to any [mobile] home covered, any standard regarding construction or safety applicable to the same aspect of performance of such [mobile] home which is not identical to the Federal [mobile] home construction and safety standard.

Congress made clear vis-a-vis the areas in which it is acting (here, *construction* and *safety),* federal mobile home standards are to be the only permissible ones. To understand the scope of preemption, however, the court often must look beyond the

words of preemption to the very purposes of federal statute. The National Manufactured Housing and Safety Standards Act's express purpose is to reduce injuries and risks resulting from manufactured home accidents and to improve the quality of manufactured homes. 42 U.S.C. § 5401. The Department of Housing and Urban Development regulations adopted pursuant to the Act establish performance requirements, *see* 24 C.F.R. § 3280.1(b), in order to protect the public against any unreasonable risks of accidents due to the design or construction of mobile homes. *See id.* § 3280.1(a)(18).

Ordinance 259 is a land use law enacted to preserve property values within the City of Nederland. Unlike the local zoning law struck down in *Scurlock v. City of Lynn Haven*, Nederland is not attempting to exclude the plaintiff's mobile home from areas of the city "based solely on [the city's] safety code." 858 F.2d 1521, 1515 (11th Cir. 1988). The court in *Lynn Haven* held that the city "cannot attempt land use and planning through the guise of a safety provision in an ordinance when that safety requirement is preempted by federal law. *See Pacific Gas & Electric Co. v. State Energy Resources Commission*, 461 U.S. 190, 204-216, 103 S.Ct. 1713, 1722-28, 75 L.Ed.2d 752 (1983)." *Id.* at 1525.

In the case at bar, the Plaintiffs claim that Nederland believes its Standard Building Code is superior in terms of safety construction to that of the HUD-code for manufactured homes. This allegation that Ordinance 259 is a "disguised attempt to regulate construction or safety" is wholly without colorable support in the record. Plaintiffs seem to mistakenly relate the issue of preemption with their claim that the ordinance is arbitrary and capricious. This ordinance, whether arbitrary or not, does not relate in any way to construction and safety

standards. Ordinance 259, a zoning law regulating the location of HUD-code manufactured homes and other mobile homes, is not preempted by the National Manufactured Housing and Safety Standards Act.

2. The State Act

State preemption analysis begins with article XI, sec. 5 of the Texas Constitution which commands that no ordinance "shall contain any provision inconsistent with . . . the general laws enacted by the Legislature of this State." *See also Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).

Plaintiffs claim that Ordinance 259 conflicts with the Texas Manufactured Housing Standards Act (TMHSA), Article 5221f, Tex. Rev. Civ. Stat. The legislative reach of this statute can be easily defined. The TMHSA attempts to encourage the construction of housing for the state's citizens and improve the safety and general welfare of purchasers of manufactured housing in the state. Art. 5221f § 2.

The Florida state preemption issue in *Lynn Haven* was quite different than the preemption issue in this suit. Florida had a state statute which expressly prohibited zoning classifications based upon the mobility of a dwelling. Texas has no such statute.

In *City of Brookside Village v. Comeau*, 633 S.W.2d 790 (Tex.), *cert. denied*, 459 U.S. 1087 (1982), a court for the first time addressed the issue of a municipality's restriction on the location of manufactured homes in Texas. The court held "that such regulation of mobile homes represents a valid exercise of a municipality's police power." *Id.* at 793. The Texas Supreme

Court found that the ordinance in question bore an adequate relationship to the public health, safety, morals or general welfare.

Plaintiffs claim that section 4A of the TMHSA strips Texas municipalities of their zoning power vis-a-vis HUD-code manufactured homes. This is a misreading of section 4A of bewildering proportions. The plain meaning of section 4A, let alone the holding of *Comeau*, makes clear a municipality's power to regulate HUD-code manufactured homes:

> An incorporated city may prohibit the installation of a mobile home for use or occupancy as a residential dwelling within its corporate limits : . . . Upon application the installation of HUD-Code manufactured homes shall be permitted as residential dwellings in those areas determined appropriate by the city . . . .

The TMHSA does allow existing mobile homes to be switched out for HUD-code manufactured homes. The TMHSA also forbids cities from taking action against mobile homes which were lawfully located in a city before a zoning law went into effect. In short, the Texas legislature decided to forbid cities from zoning residents out of their established housing and to allow persons who currently were lawfully residing in a mobile home to replace that mobile home with a HUD-code manufactured home. The Texas legislature, however, provided not as much as a hint that municipalities were no longer free to regulate the location of HUD-code manufactured homes. Indeed, the construction of the statute makes clear that cities need only allow HUD-code manufactured homes in areas "determined

appropriate"; the statute does not command cities to allow the HUD-code manufactured homes in "all areas" of their cities. Ordinance 259 is not preempted by the Texas Manufactured Housing Standards Act.

C. FOURTEENTH AMENDMENT CLAIMS

Municipalities may zone land to pursue any number of legitimate objectives related to the health, safety, morals or general welfare of the community. Ever since the Supreme Court case of *Euclid v. Ambler Realty Company,* 272 U.S. 265, 47 S.Ct. 114, 71 L.Ed. 303 (1926), the power of municipalities to enact zoning ordinances has been fully upheld.

1. Due Process Claims

a. Substantive Due Process

Federal courts reviewing local zoning decisions are to utilize the same constitutional standards employed in reviewing statutes enacted by state legislatures. *Shelton v. City of College Station,* 780 F.2d 475, 479 (5th Cir. 1986), *cert. denied,* 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986). Because the Plaintiffs in the case at bar are challenging Nederland's legislative judgment, the Plaintiffs are not asked to simply show that a disputed historical fact is more likely than not to be true; rather, they must prove that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley,* 440 U.S. 93, 110-11, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979).

Federal judicial interference with a zoning ordinance is

proper only if the governmental body could have no legitimate reason for its decision. *See Shelton* at 483. "The key inquiry is whether the question is 'at least debatable' . . . . If it is, there is no denial of substantive due process as a matter of federal constitutional law." *Id.* (citation omitted).

To prevail at trial, the Plaintiffs must establish Nederland's belief that, if left unregulated as to location, HUD-code manufactured homes may reduce surrounding property values is irrational. Defendants, however, have been able to show there to be no genuine issue of fact as to the rationality of their property value judgment.

This court finds as a matter of law that a reasonable individual could argue that mobile homes may adversely affect the property values of surrounding areas. Because Nederland has "at least debatable" grounds for distinguishing mobile homes from site-built and modular homes, as a matter of constitutional law, it did not act arbitrarily and capriciously nor deny Plaintiffs substantive due process.

The court need not focus upon record facts and may look merely to hypothesized purposes rather than insisting Defendants prove their actual purpose, or basis of their decision and the rationality of that basis for decision. *Shelton*, 780 F.2d 480, 481.

2. Equal Protection and Right to Travel

The Plaintiffs' equal protection claim likewise fails under Fifth Circuit precedent. If the legislative purpose is legitimate, an equal protection challenge fails if it is at least debatable that the ordinance in question has a rational relationship to the

legislative purpose. *See Stern v. Tarrant County Hospital District*, 778 F.2d 1052, 1056 (5th Cir. 1985), *cert. denied*, 476 U.S. 1108, 106 S.Ct. 1957, 90 L.Ed.2d 365 (1986); *Kaplan v. Clear Lake City Water Authority*, 794 F.2d 1059 (5th Cir. 1986); *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d (1966). "The constitutional test for rationality of a legitimate classification, whether the classes be distinguished in the text of the law or in its administration, is whether any rational decisionmaker could have so classified." *Stern*, 778 F.2d at 1056 (citations omitted).

3. Takings and Procedural Due Process

A reasonable ordinance which may result in the reduction of property values does not itself create a compensable taking. The typical municipal land use ordinance enacted after an individual has purchased the land in question does not constitute a taking. *See Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). Even if the economically optimal use of Mr. Waller's land is foreclosed, the fundamental attributes of ownership remain intact. Mr. Waller can continue to make beneficial use of his land. Hence, Ordinance 259 does not constitute a compensable taking.

4. The Right to Privacy

As tempting as it is for this court to announce new personal rights which are fundamental or implicit in the concept of ordered liberty, it declines to do so. If it were to develop new and progressive rights to privacy, the Plaintiffs' claims would neither be recognized in this new jurisprudence nor as falling under any traditionally protected penumbra. *See Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed. 405 (1976).

Appendix D

D. THE INTERSTATE COMMERCE AND RIGHT TO TRAVEL CLAIMS

Nederland's zoning scheme does not differentiate between HUD-code homes built within the state and those built outside the state. Indeed, Ordinance 259 is simply meant to conserve property values. Hence, Ordinance 259 is facially nondiscriminatory and is designed to meet a legitimate social welfare objective. For Commerce Clause analysis in these circumstances, the court is reluctant to intervene:

> Where the [government enactment] regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) (citation omitted). This court holds that Ordinance 259 is not unduly burdensome on interstate commerce in light of its limited effect on free movement of interstate commerce and the traditional state police power concerns the ordinance addresses. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981).

Furthermore, the claims regarding Ordinance 259's burden on the right to travel are baseless. Right to travel generally implicates residency requirements. Here, the law in question

puts an insignificant burden, if any whatsoever, on individuals' right to travel interstate.

CONCLUSION

Federal courts are not a forum for the review of every run-of-the-mill land-use dispute. *Lemke v. Cass County, Nebraska*, 846 F.2d 469 (8th Cir. 1987); *Delta Environmental Services, Inc. v. Plaquemines Parish Government*, 708 F.Supp. 136, 141 (E.D. La. 1989). These political disputes do not rise to the level of Constitutional significance.

Even if Nederland's government made an unwise decision or their decision-making process was not as thorough as Plaintiffs would like, the bottom line is this: the judiciary will defer to political decisions regarding the health, safety, morals and welfare of the citizenry which are at least minimally reasonable and do not otherwise insidiously discriminate or infringe upon fundamental interests.

The two legislative enactments in this case preempt the field of mobile home regulation as to construction, safety, and installation of mobile homes. These statutes do not conflict with Nederland's ordinance regulating the **location** of mobile homes. Hence, Ordinance 259 is hereby upheld as compatible with state and federal legislation.

If general improvements in the appearance and quality of manufactured mobile homes are indeed as Plaintiffs contend, then their resources would be better invested in championing the power of their argument. In so doing, they may persuade municipalities like defendant Nederland to alter ordinances

regarding such restrictions. Such changes, however, are political matters to be determined by the legislative not judicial process.

SIGNED this 7th day of September, 1995.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ENTERED SEPTEMBER 7, 1995

NO. 1:94-CV-398

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Plaintiffs,

VS .

CITY OF NEDERLAND, and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Defendants.

ORDER

Before the court is the defendants' Motion for Summary Judgment. After considering the Motion, and in accordance with the memorandum of this date, this court is of the opinion that the Motion should be GRANTED. It is therefore ORDERED ADJUDGED and DECREED that the plaintiffs, A.J. Waller and Texas Manufactured Housing Association, take nothing by reason of their complaint.

SIGNED this 7th day of September, 1995.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE

APPENDIX E — HUD REPORT DATED MAY 2, 1995

THE NATIONAL HOMEOWNERSHIP STRATEGY: PARTNERS IN THE AMERICAN DREAM

U.S. Department of Housing and Urban Development
May 1995

Appendix E

THE WHITE HOUSE

WASHINGTON

May 2, 1995

Our nation's greatest promise has always been the chance to build a better life. For millions of America's working families throughout our history, owning a home has come to symbolize the realization of the American Dream. Yet sadly, in the 1980s, it became much harder for many young families to buy their first homes, and our national homeownership rate declined for the first time in forty-six years. Our Administration is determined to reverse this trend, and we are committed to ensuring that working families can once again discover the joys of owning a home.

This past year, I directed HUD Secretary Henry G. Cisneros to work with leaders of the housing industry, with nonprofit organizations, and with leaders at every level of government to develop a plan to boost homeownership in America to an all-time high by the end of this century. *The National Homeownership Strategy: Partners in the American Dream* outlines a substantive, detailed plan to reach this goal. This report identifies specific actions that the federal government, its partners in state and local government, the private, nonprofit community, and private industry will take to lower barriers that prevent American families from becoming homeowners. Working together, we can add as many as eight million new families to America's homeownership rolls by the year 2000.

Expanding homeownership will strengthen our nation's families and communities, strengthen our economy, and expand

this country's great middle class. Rekindling the dream of homeownership for America's working families can prepare our nation to embrace the rich possibilities of the twenty-first century.

s/ Bill Clinton

Appendix E

Foreword

I am honored to present *The National Homeownership Strategy* for the consideration of the American people. The strategy was prepared in response to a request from President Clinton. On Nov. 5, 1994, the President called for a national effort to lift America's homeownership rate to an all-time high by the end of the century. He directed me to develop a National Homeownership Strategy to reach this goal and to form a national partnership of the private, public, and community sectors to carry out the strategy.

Homeownership is the American dream, but the dream has been fading since 1980, when the national homeownership rate slipped into decline after 46 years of steady growth. Although the homeownership rate has risen over the past 2 years, it is still well below its historic peak. Reviving the trend toward greater homeownership is vital to our Nation's families, communities, and economic prosperity.

The goal of this strategy is ambitious: to generate up to 8 million additional homeowners from 1995 through the year 2000. The strategy recommends a series of concerted actions to help middle-income and low-income families, racial and ethnic minorities, families with children, and young adults overcome current barriers to homeownership. These actions will be undertaken by private industry, national nonprofit organizations, nonprofit community groups, and Federal, State, and local governments working in cooperation at the national, State, and local levels.

Working as partners in this way, we can translate strategy into achievement, making the dream of homeownership a reality

for millions of hard-working people and building a better future for all Americans.

s/ Henry Cisneros
Henry Cisneros
Secretary of Housing and
Urban Development

Appendix E

* * *

Eliminate Regulatory and Financing Barriers to the Availability of Manufactured Housing

STRATEGY: The partnership should initiate a series of major regulatory, administrative, legislative, research, and educational initiatives to eliminate barriers to the availability of quality, affordable manufactured housing and to its acceptance among State and local regulatory agencies and financing entities.

Issues and Impediments: Manufactured housing is a major source of affordable housing, especially for many lower and moderate-income families living in rural and suburban areas. In 1994 over 300,000 manufactured homes — one out of every five single-family homes built — were added to the national housing stock.

Most purchasers of manufactured homes who would not otherwise be able to purchase a home express satisfaction with their home. Yet, prospective homebuyers face Federal, State, and local regulatory, as well as financing, barriers. Some of these barriers stem, in part, from the public's perception of the quality, safety, and durability of manufactured housing.

There is general support among the homebuilding industry, consumer groups, and government regulators that the following initiatives will increase the availability of manufactured housing:

* Continuation of a Federal preemptive building code and a uniform enforcement system to facilitate interstate commerce and ensure affordability.

Appendix E

* Fair and timely administration of construction standards.

* Strong Federal-State regulatory cooperation.

* Establishment and enforcement of State installation standards and other appropriate regulatory programs.

* Effective, market-driven consumer warranties.

* Access to the full range of housing finance resources.

Manufactured housing has a unique status — it is the only housing built under a Federal preemptive code. As such it is the only form of housing in which the Federal Government, working in cooperation with private industry and State and local governments, plays the leading role in the construction process. The performance nature of the HUD code, with emphasis on value engineering and uniform enforcement, has allowed a range of technological innovations in the use of materials and procedures.

> North Carolina has one of the most comprehensive and successful State programs for manufactured housing in the nation. Key elements of the program include:
>
> Consumer Complaint Tracking — Staff process and handle complaints.
>
> Training in Home Setup and Anchoring — The State trains dealers and sets up companies on proper techniques for installing and handling.

Appendix E

Setup Standards — The State will publish a manual on generic setup requirements for all manufactured homes.

Tie-Down Requirements — North Carolina has required tie down of all manufactured and mobile homes since 1970.

Third-Party System — A third-party inspection agency has been used since 1970 to enforce State restrictions and relicensing requirements.

Warranty Program — North Carolina requires a 12-month warranty on all new homes for "substantial" defects that affect the performance of the home.

Licensing — Manufacturers, setup companies, dealers, and sales persons all must be licensed by State agencies.

For a number of reasons — legal considerations of property title and taxation, sales and distribution systems, zoning and land-use patterns, and family income — most manufactured homes are owned as personal property rather than as real estate. Such ownership requires that these homes be financed with consumer loans rather than with conventional home mortgages. Homebuyers who wish to locate their manufactured homes on land they own or are purchasing deserve access to mortgage financing. There now are barriers to placing a mortgage on a property that includes a manufactured home. Manufactured home financing has evolved along a separate path from other

single-family home financing. As a result, communication between traditional mortgage lenders and the manufactured housing industry has been somewhat limited. Because the demand for locating and financing manufactured homes as real estate is growing, the partnership should work to break down the barriers to mortgage financing so that purchasers of manufactured homes are not unfairly denied access.

Similarly, many urban and suburban communities limit the availability of manufactured homes through regulatory and zoning practices. As a result, manufactured housing has evolved as a primarily rural form. Under many local zoning- and ordinance-related development controls, such housing is either completely excluded because it is not considered a single-family dwelling, or it is relegated solely to manufactured home parks.

Action 23: Regulatory Review of Manufactured Homes

HUD should work in cooperation with State and local governments, private industry, and consumers to review and update its current system of regulating manufactured housing. This effort should include, but not be limited to:

* Adopting a consensus-based process and streamlined procedures to promote timely updates and the development of standards to ensure that manufactured housing is both a safe and affordable form of housing.

* Reviewing the current private inspection system to ensure effective inspections.

* Promoting the availability of consumer protection that is equal to or broader than protection for other forms of single-family residences.

Appendix E

Action 24: State Participation in Manufactured Homes

> California has led the way in the use of manufactured homes in traditional subdivisions. As a result of State legislation permitting HUD-code homes to be developed in single-family neighborhoods, there has been greater public acceptance of manufactured housing.
>
> For example, using local redevelopment funds, the Poway Redevelopment Agency in Poway, California, developed the Haley Ranch Estates. The Haley Ranch Estates consist of 65 rental units starting at $250 a month, which is well within reach of families earning low and moderate incomes.

The partnership should improve and strengthen the role of State governments in manufactured housing. For example, partners should encourage more States to assume regulatory responsibilities, develop appropriate installation standards and inspection procedures, and evaluate the adequacy of consumer protection programs.

Action 25: Cooperative Research for Manufactured Homes

The partnership should initiate cooperative research and demonstration efforts to accelerate the development of technologies for manufactured housing. Specifically, HUD and the manufactured home industry should:

* Evaluate new technologies for potential use in the next

generation of manufactured homes to achieve efficiency, affordability, quality, and durability.

* Initiate cooperative research efforts to develop cost-effective and safe installation technologies to obtain private financing.

* Initiate education and dissemination efforts to accelerate research into innovative, efficient, and effective construction practices.

Action 26: Manufactured Home Industry Initiatives

The partnership should determine the feasibility of establishing programs to improve nationwide installation standards and enforcement and generate an industrywide consensus on warranties that offer consumers comprehensive coverage on both the manufactured home and its installation. Working together, home manufacturers, retailers, and other industry segments should:

* Provide technical assistance to State governments and encourage them to establish installation standards and corresponding enforcement programs.

* Identify and promote voluntary industry guidelines for market-driven warranties offering consumers comprehensive coverage of manufactured homes that includes installation.

Action 27: Zoning and Land Development Reform for Manufactured Homes

The partnership should identify and promote zoning and land development policies that are more conducive to manufactured

housing. As part of this initiative, partners should develop model legislation for States and localities to adopt that prohibits exclusion of manufactured housing solely on the basis of HUD certification. The partners also should produce design and land development criteria and guidance materials for use by housing developers and local governments, to facilitate inclusion of manufactured housing in their jurisdictions. To supplement these efforts, the partnership should offer a cooperative program of education and technical assistance to encourage nationwide acceptance of the model legislation within 6 years.

Action 28: Access to Financing for Manufactured Homes

The partnership should undertake a comprehensive program to expand the availability of financing for purchasers of manufactured homes who wish to own their homes. This program should include:

* An improved and simplified FHA financing program to replace the existing FHA Title I home modernization program.

* Simplification of the FHA 203(b) program for manufactured housing.

* Provision for adequate loans to cover installation of manufactured homes.

* Review of the technical criteria for acceptable manufactured home installation standards.

* Review of the appraisal guidelines of manufactured homes.

* Education and marketing on the availability of mortgage financing for manufactured homes.

* * *

Supreme Court, U.S.
F I L E D
MAY 23 1997
CLERK

No. 96-1707

In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Petitioners,

vs.

CITY OF NEDERLAND and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Citations	ii
Statement of Jurisdiction	1
Statement of the Case	1
A. Course of Proceedings and Disposition of the Case Below.	1
B. Correction of Misstatements in the Petition	3
Reasons for Denying the Writ	4
I. The Fifth Circuit's Holding Was Correct And Does Not Require A Finding Of Intentional Violation In Order To Find A Municipality's Actions Are Preempted By Federal Law.	6
II. The Fifth Circuit's Holding Does Not Require Proof Of Protectionist Intent And Properly Found No Violation Of The Dormant Commerce Clause.	11
III. The Fifth Circuit Correctly Found The District Court Properly Granted Summary Judgment	14
Conclusion	18

Contents

Page

TABLE OF CITATIONS

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Blue Circle Cement, Inc. v. Board of County Commissioner, etc., 27 F.3d 1499 (10th Cir. 1994) 16

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Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992) 6

Jake Waller, Sr. v. City of Nederland, Texas, Cause No. D-144,168, 136th Judicial District of Jefferson County, Texas 2, 3

Maine v. Taylor, 477 U.S. 131, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986) 11

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Contents

Page

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Statutes Cited:

28 U.S.C. § 1254(1) 1

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42 U.S.C. § 5401-5426 9

42 U.S.C. § 5403 10

42 U.S.C. § 5403(d) 4, 6, 8

42 U.S.C. § 5403(h) 6

Contents

Page

United States Constitution Cited:

Fifth Amendment 2

Rule Cited:

Supreme Court Rule 15.1 3

Other Authorities Cited:

15A Am. Jur. 2d, *Commerce* § 11 11

Nederland Ordinance 259 ... 2, 4, 5, 8, 10, 12, 13, 14, 15, 18

Tex. Rev. Civ. Stat. Ann. Art. 5221f 9

APPENDIX

Appendix A — Manufactured Housing Institute Petition for Rulemaking with Attachments 1a

Respondents request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the Court of Appeals for the Fifth Circuit. The opinion of the Court of Appeals is reported at 101 F.3d 1095. (For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix B to the Petition for Writ of Certiorari.) The opinion of the District Court in this case is reported at 905 F. Supp. 37. (For the convenience of the Court, all citations to the opinion will be to the opinion attached as Appendix C to the Petition for Writ of Certiorari.)

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondents respectfully oppose the Petition for Writ of Certiorari. For the most part, the Petition criticizes the Fifth Circuit Court of Appeals on holdings never in fact made. Additionally, Petitioners assert this case should be heard by this Court due to a split among the circuits in the determination of the appropriateness of summary judgment in Dormant Commerce Clause analysis, when no such split exists in the circuits.

A. Course of Proceedings and Disposition of the Case Below.

This is a case concerning the protection of the most significant investment made by most Americans, the purchase of a home. The fundamental right of citizens to own and use real property is a foundation of our democratic government. In prohibiting the taking of private property without compensation, the Constitution reflects the sanctity of private property while

at the same time recognizing the greater public interest. An exception to the Fifth Amendment "takings clause" is the valid exercise of police power. Zoning regulation is based on police power, exercised in the promotion of public health, safety, morals or welfare. Zoning regulation is also a recognized tool of community planning, allowing municipalities, in the exercise of their legislative discretion, to restrict the use of private property for the public good.

The City of Nederland determined mobile homes scattered haphazardly throughout a city have a significant detrimental effect on the property values of site-built homes in the neighborhood. In order to safeguard the investments of its citizens, the City of Nederland passed Ordinance 259. Ordinance 259, a land use ordinance, restricts the placement of "trailer coaches" within the city limits to trailer home parks and trailer home subdivisions. The term "trailer coach" is defined in the ordinance as:

> . . . [A] transportable, single-family dwelling unit which is or may be mounted on wheels suitable for year-round occupance and containing the same water supply, waste disposal and electrical conveniences as immobile housing.

This definition clearly encompasses HUD-Code Manufactured Homes and any other type of mobile home.

On March 11, 1992, Petitioner, A. J. Waller, Sr., submitted a written request to the City of Nederland for a permit to install a mobile home on property owned by him within the city limits of Nederland, Texas. The City denied his request pursuant to Ordinance 259. Following the City's denial of a permit, Mr. Waller filed a Declaratory Judgment action in State District Court in Beaumont Texas, styled *Jake Waller, Sr. v. City of*

Nederland, Texas, Cause No. D-144,168, in the 136th Judicial District of Jefferson County, Texas. On April 15, 1994, the court signed a Final Declaratory Judgment stating the City of Nederland was entitled to enforce its ordinances, including Ordinance 259. Mr. Waller then submitted another request for a permit to install a HUD-Code mobile home on the same property within the city limits. This request was denied. In June of 1994, Petitioners filed a Complaint and Petition for Writ of Certiorari in the Eastern District of Texas, Beaumont, Division, seeking to have Ordinance 259 held unconstitutional based on various federal and state constitutional grounds. On September 7, 1995, the District Court entered an Order granting Respondents' Motion for Summary Judgment. Petitioners then appealed the District Court's granting of summary judgment to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the District Court's holding.

B. Correction of Misstatements in the Petition

Pursuant to the United States Supreme Court Rule 15.1, Respondents bring the following misstatements of facts contained in the Petition to the Court's attention.

Petitioners misrepresent to this Court as fact that "A modular home and a similarly equipped HUD-Code manufactured home look virtually identical in terms of their outward visual characteristics. The difference lies in the construction standard to which each is built." (Petition at 3 n.1). Petitioners fail to site this Court to any supporting evidence of this statement in the record below. While this has been the Petitioners' position, the record below fails to support their contention. Additionally, HUD-Code manufactured homes have a permanently affixed chassis and are mobile whereas modular housing has no such distinguishing feature.

Additionally, Petitioners also misrepresent to the Court Ordinance 259 prohibits placement of "trailer coaches" anywhere in the city except in so-called "trailer parks" (Petition at 2) and later state a "ban" on HUD-Code manufactured homes exists under the City of Nederland ordinance. (Petition at 12 n.7). Ordinance 259 does not ban the placement of HUD-code manufactured homes within the city limits of Nederland. The ordinance allows the placement of such homes not only in "trailer parks" but also allows placement in subdivisions for such housing with land under multiple ownership.

REASONS FOR DENYING THE WRIT

1. Petitioners argue a question presented by the Fifth Circuit's holding is whether intent is relevant in a preemption analysis. (Petition at 5). This is not a question which is presented by the holding below. The preemptive intent of Congress for the National Manufactured Housing and Safety Standards Act is expressly set out in § 5403(d) of the Act itself. The preemptive language of the statute clearly precludes states and municipalities from imposing construction and safety standards upon mobile homes manufactured after 1975, which differ in any respect from those developed by HUD. The Fifth Circuit did not state an unintentional encroachment on the will of Congress is not a violation of the federal preemption doctrine. To the contrary, the court states the record demonstrated Ordinance 259 is a land use ordinance which regulates the placement of these homes in order to preserve property values and does not, either intentionally or unintentionally, establish safety or construction standards.

2. Petitioners also argue the ruling on their Dormant Commerce Clause claim is contrary to Supreme Court precedent. Petitioners state the Fifth Circuit's holding establishes intent as a necessary element of a claim for municipal action which

violates the Dormant Commerce Clause. (Petition at 5). This is a misstatement of the Fifth Circuit's holding. The Fifth Circuit held it was not clear if Petitioners had demonstrated Ordinance 259 had *any* effect on interstate commerce whatsoever. The court determined the record established Ordinance 259 had, if any, only an incidental effect on interstate commerce and, thus, the District Court was correct to apply the balancing test outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970).

3. Petitioners argue the Fifth Circuit opinion presents an inter-circuit conflict and summary judgment was not appropriate on the Dormant Commerce Clause claim. However, a review of the case law does not support the Petitioners' contention the Seventh, Eighth, and Tenth Circuits have held the *Pike* analysis is inappropriate for summary judgment. Petitioners have mischaracterized the various courts' holdings. These courts have held the records in those particular cases did not support a motion for summary judgment under a *Pike* analysis. The court in the Fifth Circuit correctly determined the Petitioners did not produce evidence sufficient to create a genuine issue of material fact with respect to the whether the burden on interstate commerce clearly exceeds the local benefits, and the District Court did not err in granting summary judgment on this claim.

I.

THE FIFTH CIRCUIT'S HOLDING WAS CORRECT AND DOES NOT REQUIRE A FINDING OF INTENTIONAL VIOLATION IN ORDER TO FIND A MUNICIPALITY'S ACTIONS ARE PREEMPTED BY FEDERAL LAW.

This Court's jurisprudence under the Supremacy Clause of the United States Constitution identifies both express and implied forms of federal preemption, which are "compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 112 S. Ct. 2374, 2383, 120 L. Ed. 2d 73 (1992). Congress has expressly defined the preemptive reach of Title 42 U.S.C. § 5403(d):

> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no state or political subdivision of a state shall have authority to either establish, or continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

The preemptive language of the statute clearly precludes states and municipalities from imposing construction and safety standards upon manufactured homes that differ in any respect from those developed by HUD. Additionally, the Legislature in Title 42 U.S.C. § 5403(h) specifically excludes from coverage:

> any structure which the manufacturer certifies, in a form prescribed by the secretary, to be: (1) designed only for erection or installation on a site built permanent foundation, (2) not designed to be moved once so erected or installed, (3) designed and manufactured to comply with a nationally recognized model building code or an equivalent local code, or with a state or local modular code recognized as generally equivalent to building codes for site built housing. . . .

Thus the federal statute itself makes a distinction between HUD-Code homes and modular housing. Modular housing is not covered by the federal statute. Petitioners contend the only difference between HUD-Code manufactured homes and modular homes are the construction standards to which each is built. The permanent chassis and transportable nature of HUD-Code manufactured homes readily distinguishes them from modular housing.[1] The fact the city requires modular housing to comply with the local building code does not mean the city's restriction of HUD-Code homes is based on their safety or construction standards.

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1. Under federal law, a home is a manufactured home only if it contains a permanent chassis and is designed to be used with or without a permanent foundation. In 1992, the Manufactured Housing Institute (MHI) asked the Department of Housing and Urban Development to administratively remove the permanent chassis requirement. *HUD Docket No. R-92-1610. Manufactured Housing Institute's Petition for Rulemaking.* (Appendix A). HUD declined, reasoning that MHI's proposal was contrary to the intent of Congress and would, if adopted, expand the Act to cover other forms of housing that are constructed off site but are not designed for permanent transportability. Other types of homes which are constructed off site, but are designed to be moved only from the construction site to the site where they are to be permanently situated are not regulated under federal law. One type of such is modular housing.

The Fifth Circuit held Ordinance 259 regulates the placement and permitting of trailer coaches for the "purpose of protecting property values and does not expressly link its provisions in any way to local safety and construction standards." (Petition Appendix B at 11a). Additionally, the court found the ordinance did not, in effect, impose construction and safety standards on the mobile homes. The court pointed out the record failed to demonstrate HUD-Code homes would be permitted in areas as long as they complied with local safety and construction codes. (Petition Appendix B at 11a). Additionally, the court stated the Petitioners failed to cite evidence "that identifies the actual requirements of the 'local building code' that HUD-Code manufactured homes fail to satisfy under the ordinance." (Petition Appendix B at 11a). Therefore, Ordinance 259 did not encroach upon an area expressly reserved to the federal government by Title 42 U.S.C. § 5403(d). In fact, the ordinance allows placement of mobile homes, including HUD-Code homes, not only in mobile home parks but also subdivisions created expressly for such housing.

There is no indication in the Federal Act that Congress has deprived the local governments of their traditional zoning and police powers by its enactment of the Act. Nothing in the legislative history of the Act would demonstrate such a goal of Congress. According to Congress, the purposes of the Act "is to reduce the number of personal injuries and deaths and the amount of insurance costs and property damage resulting from manufactured home accidents and to improve the quality and durability of manufactured homes." 42 U.S.C. § 5401. The Act undoubtedly represents consumer safety legislation. A city may not restrict placement of mobile homes covered under the act based solely on the city's safety code. The record below established the City of Nederland's ordinance does not require HUD-Code manufactured homes to meet the city's building codes. Such housing is restricted to mobile home parks and

mobile home subdivisions without regard to the standards to which they are constructed.[2] Thus, the City's ordinance regulates the location of HUD-Code manufactured homes and not the standards for their construction, and is not preempted by federal law. The City of Nederland's exercise of its police power through a land use ordinance, not tied to any safety requirement, is clearly not preempted by the Federal Act.

Petitioners are incorrect in their assertion the Fifth Circuit's decision is in conflict with the Eleventh Circuit's decision in *Scurlock v. City of Lynn Haven Fla.*, 858 F.2d 1521 (11th Cir. 1988). In *Scurlock*, the court struck down, on federal preemption grounds, a city zoning regulation which required homes within a specific residential zone to meet the city's building codes. In that case, the only reason given by the city for prohibiting the Plaintiff from installing a mobile home in the specified zone was the mobile home's non-compliance with the city's building code. Under the City of Lynn Haven's ordinance, a mobile home that was built to meet the city's building codes would have been permitted, while one that was built to federal standards would not. After concluding that such regulation was preempted by federal law, the court went on to state, "undoubtedly [the city] could limit zone R-AA to conventionally built residences and exclude mobile homes." (Citations omitted). *Id.* at 1525. Thus, the court in *Scurlock* recognized a city could restrict the placement of mobile homes and not encroach on an area reserved by Congress. To require HUD-Code manufactured mobile homes to comply with the local building code was in direct conflict with the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. §§ 5401-5426, which expressly prohibits state and local governments from

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2. Petitioners cited with favor in the courts below the Texas Manufactured Housing Standards Act, Tex. Rev. Civ. Stat. Ann. Art. 5221f, which specifically allows cities to restrict installation of HUD-Code manufactured homes to "areas determined appropriate by the city."

establishing standards for safety and construction of manufactured homes which are different than federal standards. In contrast, the record below establishes the Fifth Circuit correctly found the City of Nederland's Ordinance 259 is a land use ordinance which regulates the placement of HUD-Code manufactured mobile homes within the city limits in order to protect property values. (Petition Appendix B at 11a).

Congress has expressly defined the preemptive reach of 42 U.S.C. § 5403. The preemptive language precludes states and municipalities from imposing construction and safety standards upon manufactured homes that differ in any respect from those developed by HUD. Ordinance 259 as applied by the City of Nederland regulates the placement and permitting of mobile homes for the purpose of protecting property values. Petitioners failed to present any evidence which would establish Ordinance 259 imposed construction and safety standards upon manufactured homes that differed in any respect from those developed by HUD. Ordinance 259 clearly allows the placement of these manufactured homes within mobile homes parks and subdivisions created expressly for such housing within the city limits of Nederland. The record below established the City of Nederland's ordinance did not require such manufactured homes to meet the city's building codes in order to be placed within the city limits. The ordinance merely restricted the placement of the homes in order to protect property values. The Fifth Circuit was correct in determining this case "is significantly unlike *Scurlock*." (Petition Appendix B at 10a). Accordingly, the Fifth Circuit was correct in upholding the District Court's granting of Respondents' summary judgment on the issue of federal preemption.

II.

THE FIFTH CIRCUIT'S HOLDING DOES NOT REQUIRE PROOF OF PROTECTIONIST INTENT AND PROPERLY FOUND NO VIOLATION OF THE DORMANT COMMERCE CLAUSE.

Contrary to the Petitioners' contentions, the Fifth Circuit's holding does not establish a requirement of a showing of protectionist intent under a claim for violation of the Dormant Commerce Clause. The constitutional grant to Congress, under the Commerce Clause, of the power to regulate commerce among the several states necessarily implies the subordination of the states to that power. This grant to Congress has established the immunity of interstate commerce from the control of the states. It would be violative of the Dormant Commerce Clause for a state to burden interstate commerce to the extent of disrupting the required uniformity. (*See* 15A Am. Jur. 2d, *Commerce* § 11).

In establishing the Dormant Commerce Clause, this Court has distinguished between two effects state or local regulations may have on interstate commerce, applying a different standard to each: (1) the incidental burden; and (2) an affirmative discrimination. *Maine v. Taylor*, 477 U.S. 131, 138, 106 S. Ct. 2440, 2447, 91 L. Ed. 2d 110 (1986). Negatively affecting interstate commerce is not the same as discriminating against interstate commerce. This Court has defined "discrimination" in this context to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems Inc. v. Oregon Dep't Envtl. Quality*, 511 U.S. 93, 114 S. Ct. 1345, 1350, 128 L. Ed. 2d 13 (1994).

Contrary to Petitioners' assertion, this Court has decided cases in which the differential treatment was alleged to be

motivated by reasons other than protectionist intent. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981), illustrates the way the Commerce Clause cases approach legislation ostensibly targeted at a domestic problem. In *Clover Leaf Creamery Co.*, the Court upheld a Minnesota law prohibiting the sale of milk in nonreturnable rigid or semi-rigid containers. The law was designed to ease the problem of solid waste disposal, which had been exacerbated by widespread use of nonreturnable milk containers. Although the Court acknowledged the Minnesota pulpwood industry would benefit from the law (as a result of the increased use of paper cartons), while a corresponding burden fell on out-of-state producers of plastic resin (the raw material from which the prohibited containers were produced), the Minnesota law was not a disguised import prohibition. It thus merited evaluation under the Court's balancing test. Performing that evaluation, the Court ruled the burden on out-of-state products was outweighed by the in-state benefits. In so ruling, the Court gave credence to the environmental benefits of the legislation and concluded any discriminatory effect upon out-of-state producers was attenuated.

The Fifth Circuit found the facts in this case closely resemble those in *Clover Leaf Creamery Co.* (Petition Appendix B at 14a). The Petitioners attempted to distinguish *Clover Leaf* by contending modular homes, unlike the product in *Clover Leaf Creamery Co.*, are produced by only in-state suppliers. However, the Fifth Circuit correctly found "Plaintiffs have not demonstrated that whatever mode of housing is built in lieu of HUD-Code manufactured homes, it will be provided by in-state suppliers." (Petition Appendix B at 20a).

Petitioners imply the Fifth Circuit found Ordinance 259 did not affirmatively discriminate against HUD-Code manufactured homes because all such homes, "regardless of place of

manufacture, are excluded" and then determined this finding was "dispositive of the discrimination question." (Petition at 11 n. 5). However, as is clearly set out by the Fifth Circuit's opinion, as well as the District Court's opinion, the Court applied the balancing test outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970), after determining the facts demonstrated Ordinance 259's effect on interstate commerce was only incidental. Consequently, a two-step approach to determine the constitutionality of legislation under the Dormant Commerce Clause is proper. When an ordinance does not directly discriminate against interstate commerce, the Court applies a rational basis review balancing test. *Id.*

Petitioners have argued Ordinance 259 discriminates against HUD-Code manufactured homes, which they characterize as an "out-of-state product," while permitting modular homes, which they characterize as an "in-state product." Ordinance 259 does not absolutely prohibit mobile homes nor does it place any restrictions on out-of-state modular housing. The federal statute itself differentiates between these two types of housing. The District Court and the Fifth Circuit recognized the Petitioners' own evidence demonstrated the "markets for modular homes and for HUD-Code manufactured homes, though overlapping, are basically distinct". (Petition Appendix B at 18a). In the case at bar, the Fifth Circuit stated, "There are two markets at work, and the Plaintiffs have not presented evidence demonstrating a restriction on HUD-Code manufactured homes will result in a corresponding increase in sales of modular homes." (Petition Appendix B at 18a). Citing both *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978), and *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S. Ct. 715, 66 L. Ed. 2d 659 (1981), the Fifth Circuit held the District Court was correct in holding Ordinance 259 did not discriminate against interstate commerce, but regulated evenhandedly, and upheld the District Court's finding

Ordinance 259 was thus subject to the balancing test. The Fifth Circuit held the District Court correctly applied the *Pike* balancing test to the facts in this case. The Fifth Circuit also properly recognized "[t]he crucial inquiry . . . must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S. Ct. 2531, 2535, 57 L. Ed. 2d 475 (1978). (Petition Appendix B at 13a). The record below clearly demonstrated Ordinance 259 represented a legitimate local purpose, preservation of property values, and the Petitioners failed to demonstrate an excessive burden on interstate commerce compared to this local interest. The Fifth Circuit's opinion cannot reasonably be interpreted to require proof of protectionist intent, and properly found no violation of the Dormant Commerce Clause.

III.

THE FIFTH CIRCUIT CORRECTLY FOUND THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT.

Petitioners claim there is a split among the Courts of Appeals in their approach to applying the balancing test outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), at the summary judgment level. (Petition at 12). In support of this argument, Petitioners cite three cases from the Seventh, Eighth, and Tenth Circuits which they contend demonstrate these circuits have found the *Pike* test to be inappropriate for summary judgement. However, a careful reading of these cases demonstrates these circuits have not held summary judgment to be inappropriate under a Dormant Commerce claim *Pike* analysis. Instead, these courts have held the records in those particular cases did not support a motion for summary judgment.

In *Cotto Waxo Company v. Williams*, 46 F.3d 790 (8th Cir. 1995), out-of-state manufacturers of petroleum-based compounds brought an action against the Commissioner of Minnesota Pollution Control Agency, alleging the Minnesota statute, which prohibited the sale of petroleum-based sweeping compounds, violated the Dormant Commerce Clause. The District Court held the local benefits of the law outweighed the law's burden on interstate commerce, and granted summary judgment in favor of the state. The Eighth Circuit reversed, holding although the statue did not affirmatively discriminate against interstate commerce, it was still subject to the *Pike* balancing test. Although the court attempted to apply the test, it was unable to do so because "neither side of the scale holds an impressive amount of weight. The record reflects no great burden on interstate commerce . . . Similarly, the record reflects no great benefit to the public as a result of the Act." *Id.* at 94, 95. In contrast, in this case, the significant local interest which is protected by Ordinance 259 is the maintenance of property values within the City of Nederland. The Fifth Circuit correctly points out the burden on interstate commerce, if any, is incidental. The City of Nederland's ordinance does not prohibit the placement of mobile homes in the city altogether. These homes may be bought, sold, and placed within the city. Ordinance 259 simply restricts the placement of these homes to mobile home parks and mobile home subdivisions in order to maintain the property values of the area. The commerce clause protects the interstate market, not particular interstate firms, from burdensome regulations. *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978). The Petitioners failed to present any evidence that whatever mode of housing is built in lieu of HUD-Code manufactured housing will be provided by in-state suppliers. Thus, the record below does not demonstrate a burden on interstate commerce which is excessive compared to the local interest.

The Petitioners also cite *Blue Circle Cement, Inc. v. Board of County Commissioner, etc.*, 27 F.3d 1499 (10th Cir. 1994), in support of their argument. In *Blue Circle Cement, Inc.*, the District Court failed to apply the *Pike* test at all once it determined the relevant statute did not affirmatively discriminate against interstate commerce. In that case, Blue Circle, an Alabama corporation with its principal place of business in Georgia, operated a quarry and cement manufacturing plant in Rogers County, Oklahoma. To reduce the cost of heating its kilns, Blue Circle sought to convert the hazardous waste fuels which were derived from the blending of various industrial wastes. The Board of County Commissioners informed Blue Circle the county ordinance required a conditional use permit for the burning of hazardous waste fuels. Blue Circle filed suit alleging the ordinance was preempted by federal law and was violative of the commerce clause. The District Court issued a summary judgment order in favor of the board holding the Board's zoning ordinance was not preempted by federal law; the ordinance did not violate the commerce clause, and the ordinance was constitutional as applied to Blue Circle. Far from holding the *Pike* analysis was inappropriate, the Tenth Circuit criticized the District Court for its failure to apply the test. In that case, the court held there was no evidence hazardous waste fuels would present any significant health or safety hazard, nor was there any evidence the ordinance's requirements were related in any reasonable way to any hazard the hazardous waste fuels might present. The court then went on to apply the test itself and, based on its application of the facts to the factors identified in *Pike*, determined the record was inadequate to support a summary judgment.

The Petitioners further cite *National Solid Waste Management Ass'n v. Meyer*, 63 F.3d 652 (7th Cir. 1995). In that case, the Wisconsin statute provided both in-state and out-of-state waste generators were barred from dumping listed

materials in Wisconsin's landfills unless they resided in a community that had adopted an "effective recycling program." In *National Solid Wastes Management Ass'n,* the Seventh Circuit did not hold summary judgment inappropriate because use of the *Pike* analysis was inappropriate. The Solid Waste Management Trade Association and Landfill Owners and Operators filed a 42 U.S.C. § 1983 action against the Wisconsin Department of Natural Resources, challenging the constitutionality of Wisconsin's recycling statute. The court held the *Pike* test was inappropriate because the facts in that case demonstrated the recycling statute controlled conduct of those engaged in commerce occurring wholly outside the state and, thus, directly regulated interstate commerce in violation of the commerce clause. The court went on to state even if the statute did not directly discriminate against interstate commerce, it would be subject to the *Pike* analysis and would not "pass muster," because the burden imposed on interstate commerce was excessive in relation to the local interest served by the statute.

Thus, the cases cited by the Petitioners do not support their contention there is a split among the circuits as to the application of the *Pike* analysis in a summary judgment context.

In comparing HUD-Code manufactured homes with modular homes, the Fifth Circuit found "there are two markets at work, and Plaintiffs have not presented evidence demonstrating that restriction on HUD-Code manufactured homes will result in a corresponding increase in sales of modular homes." (Petition Appendix B at 18a). Noting the record demonstrated Fannie Mae guidelines require an appraiser, when appraising a conventional site-built home, to mention in the report the presence of any mobile homes or HUD-Code manufactured homes in the neighborhood, the Fifth Circuit properly determined Ordinance 259 has only an incidental effect,

if any, on interstate commerce and the District Court was correct in applying the balancing test outlined in *Pike*. (Petition Appendix B at 19a, n.9). Petitioners further failed to demonstrate that whatever mode of housing was built in lieu of HUD-Code manufactured homes would be provided by in-state suppliers. (Petition Appendix B at 20a). Accordingly, the record demonstrated only a slight burden, if any, upon interstate commerce clearly not excessive to the legitimate local interest of preserving property values. In summary, the Fifth Circuit properly upheld summary judgment by the District Court because the record did not raise a genuine issue to support a burden of Ordinance 259 on interstate commerce excessive to the local benefit of said ordinance.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — MANUFACTURED HOUSING INSTITUTE PETITION FOR RULEMAKING WITH ATTACHMENTS

Mr. Jerry C. Connors, President
Manufactured Housing Institute
1245 Jefferson Davis Hwy., Suite 511
Arlington, Virginia 22202

Dear Mr. Connors:

This is in further response to your letter of June 17, 1992 to Mr. Francis A. Keating II, the Department's General Counsel. Your communication petitioned for a rulemaking proceeding in which HUD would propose recommended modifications to the Manufactured Housing Construction and Safety Standards regulations.

As Mr. Keating indicated in his June 26, 1992 letter to you, your request for modifications to four transportation definitions in 24 CFR 3280, Subpart J has been treated as a petition for rulemaking, and has been the subject of a policy review by my office, as well as discussions with the General Counsel and his staff.

Following this review and consultation, the Department has concluded that the initial issue presented by your petition is whether the Department has the legal authority to amend its regulations implementing the National Manufactured Housing Construction and Safety Standards Act of 1974 to define the term "chassis" in the manner you have proposed. Unless that question can be answered affirmatively, the determination whether sound policy reasons exist for the requested modification of definitions contained in the regulations does not really arise.

Appendix A

The Department has applied the plain meaning of the Act in interpreting the Congress' use of the term "permanent chassis", and has concluded that MHI's proposed definition of "chassis" would not be consonant with the statute. Moreover, adoption of MHI's proposal would have the effect of giving the Department jurisdiction over all modular housing — thereby extending the area of responsibility assigned to HUD by the Act. Because the Department believes that it lacks authority to extend or modify its regulatory jurisdiction in this manner, HUD has concluded that accomplishing your desired purpose would require legislative action.

Background

The Department considers the essential part of the chassis to be the frame, which generally consists of two steel I-Beams running the length of the manufactured home, on which the body of the home is constructed and on which the running gear and wheels, lights and coupling mechanism are attached. Your organization's proposal is justified, in part, by the proposition that the removal of the transportation frame (i.e. the steel I-Beams) will facilitate the siting of the home on a permanent foundation. However, 24 C.F.R. § 3280.904(a) already contains a note providing for frames that are integrated into the home's structure and, thus, facilitate siting on a permanent foundation without the removal of the chassis. That note states the following:

> While the majority of manufactured homes utilize a fabricated steel frame assembly, upon which the manufactured home structure is constructed, it is not the intent of this standard to limit innovation. Therefore, other concepts, such as integrating the frame

> function into the manufactured home structure, are acceptable provided that such design meets the intent and requirements of this part.

The Department has approved designs, such as the Lindsey Floor System, which integrate the frame into the home's structure. The Lindsey Floor System is currently being used by several manufacturers.

Your proposal essentially would redefine the floor of the manufactured home as the permanent chassis, and would take what the Department now considers to be the permanent chassis and redefine it as a removable transportation frame.[1]

In 1990, MHI and the industry supported a major rewrite of the Act introduced by Congressman John Hiler (3rd District of Indiana). The "Hiler Amendment" to the Affordable Housing Act of 1990 (HR 1180) carried a provision striking the phrase ". . . built on a permanent chassis. . ." from the Act's definition of manufactured home. The Amendment passed the House but was defeated in the Senate. MHI's Petition for Rulemaking suggests that the Department has the authority to do what the Congress has not done — allow for the removal of the chassis.

The Proposal Conflicts with the Plain Meaning of the Statute.

The use of the term "mobile" in the original title of the Act implies that the intent was that these homes could be

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1. Nothing in the Act, the Manufactured Home Construction and Safety Standards or the Regulations precludes manufacturers of manufactured homes from building homes with removable chassis. However, if the manufacturer does so, the home will be outside the jurisdiction of the Act.

permanently transportable. Congress made no distinction for permanently sited manufactured homes. In fact, the Act was intended to cover all structures that are "*transportable,* [that meet the size requirements and that are] built on a permanent chassis and designed to be used as a dwelling *with or without* a permanent foundation." 42 U.S.C. §5402(6) (emphasis added). MHI's proposal seeks to allow manufacturers to design and construct homes that would not be "transportable" after they are installed on a permanent foundation.

The District Court for the District of Columbia, in the only case specifically to address the removable chassis issue, held that "[t]o permit a manufacturer to overbuild the underside of [a manufactured] home, transport it on a traditional metal frame, and then discard the transportation frame . . . would defeat the purpose of the National Manufactured Housing Act to create 'transportable' homes." *Association For Regulatory Reform v. Pierce,* 670 F.Supp. 1041, 1051 (D. D.C. 1987), *affirmed in part and vacated in part,* 849 F.2d 649 (D.C. Cir. 1988).[2]

Congress did not define "permanent chassis," and the legislative history of the Act does not provide any insight into what Congress specifically meant by "permanent chassis." In statutory interpretation, the courts have held that the plain meaning of legislation should be conclusive, except in rare cases in which the literal application of a statute would produce a

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2. The appeals court, in *A.R.R. v. Pierce,* refused to render a decision regarding the trial court's opinion of HUD's interpretation of "permanent chassis." Instead, they vacated that portion of the trial court's ruling stating that the court "shall patiently await a concrete case of HUD disapproval of a particular design before embarking upon a judicial expedition aimed at measuring the fidelity of the agency's specific regulatory action to the statutory and regulatory regime that governs the arcane world of manufactured housing." 849 F.2d at 656.

result demonstrably at odds with the intention of its drafters. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982).

Webster's Dictionary defines "chassis" as:

> a: the frame upon which is mounted the body (as of an automobile or airplane), . . . or the roof, walls, floors, and facing (as of a building) b: the frame and working parts as opposed to the body (as of an automobile). . . .

The American Heritage Dictionary defines "chassis" as:

> The rectangular steel frame, supported on springs and attached to the axles, that holds the body and motor of an automotive vehicle.

Given these standard definitions of the word chassis, the Department obviously employed the "plain meaning" of the term when it defined chassis and frame for the purposes of the Standards. These definitions have remained in the Standards for seventeen years, with no indication from the Congress that the Department has misinterpreted the statutory intent. Moreover, the Department's literal application of the term "permanent chassis" — in requiring that the essential parts of the chassis remain on the manufactured home — is certainly not at odds with the Congress' clear intention that manufactured homes be "transportable."

Appendix A

The Proposal is Contrary to the Intent of the Congress because it would Expand the Authority of the Act to Include all Modular Housing:

The Act was amended in 1977 to exclude from its coverage certain modular homes that might otherwise meet the definition of a manufactured home. The Act's provision excluding modular housing, §604(h), 42 U.S.C. §5403(h), and the provision's legislative history indicate that the Congress wanted to limit the Department's authority, and to retain a clear line between manufactured and modular homes. In introducing Amendment 363 to the Housing and Community Development Act of 1977 (now §604(h) of the Act), Senator Proxmire stated:

> [T]his amendment would meet a problem that has been of great concern to a number of [modular] homebuilders . . . that is, the building of homes by prefabricating them, doing most of the building in factories, and then transporting the house to the site to have it erected there. . . . Unfortunately, this kind of modular construction has been pulled under the wing of the Mobile Home Construction and Safety Standards Act. That was certainly not the intention of the Congress. As one of the authors of that bill, I certainly had no intention of including modular homes in this particular category.
>
> 123 Cong. Rec. 17695, 17818 (June 7, 1977).

Senator Proxmire indicated further, in his remarks on the

Senate floor, that he had discussed the matter with the Secretary of HUD and read a letter he had received from the Secretary. The Secretary's letter stated, in part, that:

> A small percentage of modular structures is constructed and transported in such a way as to come within the definition of "mobile home" set out in section 603(6) of the 1974 Act. To the extent that modular units meet that definition, HUD's position has been that the statute confers regulatory authority over them. It was the Department's view that Congress did not intend to regulate any part of the modular housing industry pursuant to Title VI. Accordingly, HUD has exempted, by interim regulation, those modular homes meeting the definition of mobile homes from the Title VI standard.
>
> *Id.* (Proxmire, reading the Secretary's June 3, 1977 letter).

The regulation to which the Secretary was referring was published on June 21, 1976. As shown by the following, the 1976 rule's preamble further delineates the problem Senator Proxmire was attempting to address by introducing Amendment 363:

> [I]t has come to the attention of the Department that some structures that have traditionally been considered to be modular homes are now sometimes being manufactured with and transported on

> permanent chassis similar to those used to transport mobile homes. The Department has carefully examined the Act and its legislative history and has concluded that while it may not have been the intent of Congress to include this new type of modular housing in the definition of "mobile home," this statutory definition cannot fairly be interpreted to exclude such modular homes transported on permanent chassis.
>
> 41 Fed. Reg. 24968 (June 21, 1976).

Clearly, the legislative history of §604(h) indicates that the Congress intended to exclude from the authority of the Act that small portion of modular housing that was constructed and transported in such a way as to come within the definition of a manufactured (mobile) home. Indeed, Senator Proxmire's comments assert that the Congress never intended for *any* modular housing to come under the authority of the Act.

By adopting MHI's proposed definition of chassis, modular homes would become subject to the regulatory authority of the Department under the Act. Under MHI's proposal, a modular home's floor would be considered a chassis, thus bringing the modular home within the Act's definition of a manufactured home. Consequently, a modular home manufacturer would be required either to build to the Standards, or to comply with the requisites of §604(h) and seek exclusion from the Act for every modular home the manufacturer built. MHI's proposal is therefore contrary to the intent of the Congress in enacting the 1977 amendment. The regulations the Department issues must be within the powers conferred by the Congress. Accordingly,

the Department has concluded that MHI's proposal would require legislative action and is beyond the authority of the Department to accomplish by means of rulemaking.

For the foregoing reasons, the Manufactured Housing Institute's Petition for Rulemaking, Docket No. R-92-1610, is denied.

Very sincerely yours,

s/ Arthur J. Hill
Arthur J. Hill
Assistant Secretary for Housing —
Federal Housing Commissioner

Appendix A

Manufactured Housing Institute

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June 17, 1992

Mr. Francis A. Keating II
General Counsel
Department of Housing and Urban Development
451 7th Street, S.W., Room 10214
Washington, D.C. 20410

Dear Mr. Keating:

Thank you for taking the time to meet with Dave Barrett, Lois Starkey and me last week. We appreciate your willingness to examine MHI's request that HUD propose regulations to authorize the use of removable transportation frames for manufactured homes.

As we mentioned, we raised this issue at a meeting last December with Secretary Kemp. Following that meeting, we met with former Deputy Assistant Secretary for Single Family Housing Juan Acosta to discuss this issue and later submitted detailed information. Subsequently, we met with David Nimmer, the Director of the Manufactured Housing Program, to explain our position further. After some discussion with his staff, Mr. Nimmer asked us to provide him with the legal rationale underlying MHI's position.

While it seems only natural that an issue that has been the subject of lengthy and intense debate and even judicial

consideration would only yield to a legal solution, we believe that the solution to this problem will flow from the logic of changed circumstances rather than legalities. At the time of authorizing legislation was debated and ultimately approved, removal of the transportation frame was not an issue. All manufactured homes were designed with a transportation frame that would provide stability during transportation and also on site.

Not long after that, the innovation called for in the enabling Act led manufacturers to seek designs that would allow manufactured homes to be sited in a more traditional way, that is, at ground level and perhaps over a basement. As we have pointed out in the past, this innovation was approved and even encouraged by HUD at various times until August of 1986 when a letter was issued from the Department curtailing the practice as a violation of the law.

We at MHI believe that the focus of this debate has been misplaced. For many years industry has argued that the law should be interpreted to allow for the removal of the transportation frame and the regulations appropriately modified. Consistently, the Department has relied that the law requires manufactured homes to have a permanent chassis and that the transportation frame is an integral part of that. That debate, as we discussed last week, has raged on for several years and could go on for many more.

We would urge you to take a different approach. Manufactured homes with their transportation frames removed can be a viable addition to this country's housing stock. There are no health or safety problems. So rather than finding reasons to eliminate this form of housing, we strongly urge you to take

the lead by recognizing that building technology has changed since the inception of the HUD Code and modifying current regulations to permit the removal of transportation frames. This can be done easily enough by recognizing that the modified substructure of the manufactured home is the permanent chassis.

As we suggested at the meeting last week, this issue should be the subject of a formal rulemaking procedure and in MHI's comments on HUD's proposed revisions to the National Manufactured Home Construction and Safety Standards (MHCSS) submitted on May 22, 1992, we recommended that HUD modify four transportation definitions on Subpart J, Sections 3280.902(a), (b), (c) & (f) and 3280.904(a) & (b) of the MHCSS. A copy of our proposal is enclosed.

We look forward to hearing from you soon, and please feel free to contact me if we can be of further assistance.

Sincerely,

s/ Jerry C. Connors
Jerry C. Connors
President

Enclosures

cc: Bud Albright
Peter Race

Appendix A

RATIONALE FOR MHI's REQUEST FOR RULEMAKING ON THE REMOVABLE TRANSPORTATION FRAME

Based on our review of the National Manufactured Housing Construction and Safety Standards (NMHCSS) Act of 1974, the legislative history and the regulations implementing the Act (24 CFR Part 3280 et seq.), it is MHI's assertion that HUD has the authority to change its current regulations to authorize manufactured homes to be designed and constructed with a removable transportation frame.

Not only does the legal authority exist, in addition, MHI's proposal is also in line with HUD's objectives to remove barriers to affordable housing and to expand home ownership opportunities for low-and-moderate income Americans. It would also certainly be consistent with HUD's goals to improve the quality and durability of manufactured homes, and to encourage innovation in manufactured housing design.

In addition, our proposal meets the requirements of President Bush's initiative to examine and eliminate federal regulations that impede growth and recovery.

HUD Has the Statutory Authority to Permit Manufactured Homes to be Designed and Constructed with Removable Transportation Frames.

There is no statutory provision against allowing the removal of the transportation frame. The Act defines a manufactured home as a structure ". . . which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities. . . ." (42

U.S.C. 5401 et. seq.). The statute does not define permanent chassis.

The Manufactured Home Construction and Safety Standards (Part 24 CFR 3280.902) define the terms "chassis" and "frame". The regulations do not define "permanent chassis".

The statute does not prohibit HUD from amending its current regulations to provide for the removal of the transportation frame for permanently sited manufactured homes.

HUD Should Amend the MHCSS Regulations to Authorize the Design and Construction of Manufactured Homes with Removable Transportation Frames

MHI proposes that the Department revise Sections 3280.902 and 3280.904 to permit the removal of the transportation frame component of the home after transport, provided that the permanent fabricated substructure is properly buttressed in the approved design. A home's chassis is defined as the permanent fabricated substructure and the transportation platform may be designed to be removed for siting a home on a permanent foundation. Those homes will have been engineered to ensure that they can withstand the forces attendant to the transportation of the home coupled to a temporary transportation frame, and are appropriately modified to be sited on a permanent foundation. These recommended definitions establish three options for siting a manufactured home: with the transportation frame removed; with the transportation frame permanently attached; and, with the frame integrated into the chassis. In each case, the permanent fabricated substructure of the home is the permanent chassis, required by the definition of "manufactured home" in the Act.

Appendix A

MHI's Proposal is Consistent with Congressional Actions that Recognize Manufactured Housing as an Important Source of Affordable Housing.

Since the Act was passed in 1974, Congress has taken several actions to recognize the evolution of the product from one that was in fact "mobile," to many now designed as permanent housing. In 1980, Congress changed the terminology in the Act from "mobile" to "manufactured". The FHA(203)(b) program was modified to make HUD code housing eligible under the traditional FHA single family mortgage program. The same is true for the Veterans Home Loan Guaranty Program. Lending institutions, including the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association have approved long term mortgage loans for permanently sited manufactured homes. Most recently, when Congress passed the National Affordable Housing Act and revised its national housing policy, it specifically included manufactured housing in its definition of "housing", (Section 104(8), P.L. 101-625).

MHI's Proposal is Consistent with HUD's and Congress' Goals to Encourage Innovation

In defining the term "manufactured home" in the Act, Congress clearly stated that they would be designed to be used as a dwelling with or without permanent foundations. Congress did not wish to limit advances in technology and home design intended to meet this definition.

The HUD Manufactured Home Construction and Safety Standards (MHCSS) at 24 CFR 3280.904 contains a note which further illustrates the Department's intent to encourage innovation in the area of transportation of manufactured homes. The note states:

Appendix A

> While the majority of manufactured homes utilize a fabricated steel frame assembly, upon which the manufactured home structure is constructed, it is not the intent of the standard to limit innovation. Therefore, other concepts, such as integrating the frame function into the manufactured home structure, are acceptable provided that such design meets the intent and requirements of this part.

This provision of the standards recognizes that "other concepts" may be acceptable to the Department.

In fact HUD has already revised its definition of "chassis" when it authorized the removal of certain transportation components when manufactured homes are permanently sited. Pursuant to Title II of the National Housing Act, 12 U.S.C. Stat. 1701 *et. seq.*, HUD has implemented regulations which provide for the issuance of FHA mortgage insurance for permanently site manufactured homes. In order to qualify for such insurance HUD has required that these homes be placed on site-built permanent foundations and that they have all of their transportation components removed from them, "the towing hitch or running gear, which including axles, brakes, wheels and other parts of the chassis that operate only during transportation. . . ." (24 CFR Section 203.43f).

The MHI Proposal is Consistent with HUD Objectives to Improve Quality and Durability of Manufactured Homes.

The Act provides that HUD must set standards for manufactured homes that meet the "highest standards of quality and

durability". Over the past several years the Department has taken a number of steps to meet this objective, including efforts to encourage proper installation of manufactured homes. There is a general consensus among HUD officials, industry, and consumers that initiatives to encourage the permanent installation of manufactured homes would enhance the quality and durability of manufactured homes. MHI's proposal would encourage the design and construction of permanently sited residential manufactured homes on residential foundations, and thereby add to the home's durability.

Additionally, MHI's proposal is consistent with HUD's efforts to recognize and encourage the utilization of permanently sited manufactured housing which is treated as real estate, by authorizing the use of manufactured housing in its FHA 203(b) loan program. In fact, HUD's regulations under the FHA 203(b) program recognize that a manufactured home, in accordance with the HUD Act's definition, may have certain transportation components removed.

The MHI Proposal Furthers Secretary Kemp's Objectives to Reduce Regulatory Barriers to Affordable Housing.

A primary initiative of Secretary Kemp has been to empower people through home ownership. The Secretary has taken a leadership role in seeking the removal of regulatory barriers to affordable housing by encouraging state and local governments to remove such barriers. He can demonstrate his commitment to this laudable goal by removing a significant federal barrier within the HUD Manufactured Housing Program.

Additionally, this change would enhance affordability by reducing the cost of manufactured homes designed and

constructed for placement on permanent foundations. It will foster greater acceptance of manufactured housing in many residential neighborhoods and urban infill lots by allowing builders to design and construct manufactured homes that are more compatible with other single-family residential housing.

The MHI Proposal is Consistent with the President's Initiative to Require Federal Agencies to Review and Revise Federal Requirements that Impede Economic Growth

President Bush, in his State of the Union Address in January, directed all federal agencies to undertake a review and reform of existing and new initiatives to reduce regulatory barriers that impede economic growth.

Revising the MHCSS regulations to permit a removable transportation frame would enhance consumer acceptance of manufactured housing, and expand the supply of affordable housing to create more jobs and expand the economy.

A recent report by an independent business research firm, The Freedonia Group, confirmed that growth in the manufactured housing industry will be hindered because HUD's current requirement that prohibits the design and construction of permanently sited manufactured homes utilizing a removable transportation frame. A study by the CATO Institute, "Housing Policy in New York, Myth and Reality", reached a similar conclusion.

Summary of MHI's Proposal

For these reasons, we believe designing and constructing a home with a permanent fabricated substructure as a permanent chassis,

with the transportation frame permitted to be removed is within the statutory definition of a manufactured home under the Act. There is no statutory prohibition against amending the HUD MHCSS in Subpart J "Transportation" to permit the removal of the transportation frame. The "chassis" of the home is the permanent fabricated substructure which is moved from factory to home site on a permanent temporary transportation frame, or with the frame integrated therein.

MHI - 6/17/92

Appendix A

INDUSTRY POSITION, RATIONALE, AND PROPOSAL

SUBPART J
SECTION 3280.902(a), (b), (c) & (f)

TITLE: Transportation Definitions

DESCRIPTION OF PROPOSAL: MHI hereby proposes that HUD modify four transportation definitions (and make other corresponding revisions to Subpart J and IB-J-1-76) to encourage innovative designs and facilitate permanent siting of homes as permitted by the Act.

INDUSTRY PROPOSAL:

Revise four of the transportation definitions, as follows:

> (a) "Chassis" means the . . . *permanent fabricated substructure of the manufactured home, which provides support on site, and during transportation when coupled to a permanent or temporary transportation frame (which alternatively may be integrated into the substructure).*
>
> (b) "Drawbar and coupling mechanism" means the rigid assembly, (usually an "A" frame) upon which is mounted a coupling mechanism, which connects the manufactured home's *transportation* frame to the towing vehicle.
>
> (c) . . . .

Appendix A

"Transportation frame" means the transportation system for the manufactured home which is coupled either permanently or temporarily to the chassis and provides partial support during transportation, and on site if required by the approved design to be either permanently attached to or integrated into the manufactured home chassis; and acts as a platform for securement of the running gear assembly, the draw bar, coupling mechanism and transportation lights.

(f) "Transportation system," (Same as . . . *transportation frame,* above).

RATIONALE:

The current definitions are based upon industry practice during the early to mid-1970s. In the absence of a legislative definition of "chassis" and "transportation frame," HUD prepared the current definitions in 1975. To properly update Subpar. J, the proposed definitional changes will permit innovative designs (mentioned in the note at 3280.904(a)) and facilitate the siting of homes on permanent foundations, now permitted .n the Act (42 U.S.C. 5402(6)).

Appendix A

INDUSTRY POSITION, RATIONALE, AND PROPOSAL

SUBPART J
SECTION 3280.904(a) & (p)

TITLE: Specific Requirements for Designing the Transportation System

DESCRIPTION OF PROPOSAL:

MHI hereby proposes that HUD make revisions to this section, in line with MHI's proposed revisions to 3280.902.

INDUSTRY PROPOSAL:

Revise three paragraphs and interpretative Bulletin J-1-76, to bring them in harmony with definitional changes proposed for 3280.902, as follows:

> (a) General. The entire system (*transportation* frame, drawbar and coupling mechanism, running gear assembly, and lights) sha!l be designed and constructed as an integrated, balanced and durable unit which is safe and suitable for its specified use during the intended *use*. . . . In operation, the transportation system (supporting the manufactured home structure and its contents) shall effectively respond to the control of the braking, while traveling at applicable towing vehicle in terms of tracking and highway speeds and in normal highway traffic conditions.

Appendix A

(NOTE: While the majority of manufactured homes utilize a fabricated steel frame assembly, upon which the manufactured home structure is constructed, it is not the intent of this standard to limit innovation. Therefore, other concepts, such as integrating the frame function into the manufactured home structure, are acceptable provided that such design meets the intent and requirements of this part).

(b) Specific requirements — (1) Drawbar. The drawbar shall be constructed of sufficient strength, rigidity and durability to safely withstand those dynamic forces experienced during highway transportation. If shall be securely fastened to the manufactured home *transportation* frame by either a continuous weld or by bolting.

* * * * * * * * *

(3) . . . *Transportation frame.* The . . . *transportation frame* in conjunction with the manufactured home structure, shall be designed and constructed to effectively sustain the designed loads consisting of the dead load plus a minimum of 3 pounds per square foot floor load, (example: freestanding range, refrigerator and loose furniture) and the superimposed dynamic load resulting from highway movement but shall not be required to exceed twice the dead

load. The integrated design shall be capable of insuring rigidity and structural integrity of the complete manufactured home structure and to insure against deformation of structural or finish members during the intended life of the home.

Revise Interpretative Bulletin J-1-76, to bring it into harmony with proposed revisions to 3280.902 and .904, by striking the word "chassis" where it appears in Sections A and B in eight places and substituting the phrase "transportation frame;" and, by striking the word "mobile" where it appears throughout the bulletin and substituting the word "manufactured."

RATIONALE: See 3280.902(a), (b), (c) and (f) above.

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In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Petitioners,

vs.

CITY OF NEDERLAND and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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TABLE OF CONTENTS

	Page
Summary of Argument	1
Argument	2
I. The Fifth Circuit Correctly Held Ordinance 259 Was Not Preempted By The NMHCSSA.	2
II. The Fifth Circuit Correctly Held Ordinance 259 Did Not Violate The Dormant Commerce Clause.	6
Conclusion	10

TABLE OF CITATIONS

Cases Cited:

Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986)	7
Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992)	3
Georgia Manufactured Housing Association v. Spalding County, Ga., No. 3:94-CV-51-GET (N.D. Ga., unreported, June 13, 1996), *reh'g denied*, (N.D. Ga., unreported Feb. 6, 1997)	10
Hughes v. Oklahoma, 441 U.S. 322, 92 S. Ct. 1727, 60 L. Ed. 2d 250 (1979)	7, 9

Contents

Page

Huron Cement Co. v. Detroit, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960) 7

Medtronic, Inc. v. Lohr, 518 U.S. __, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) 3, 5

Michigan Canners & Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 104 S. Ct. 2518, 81 L. Ed. 2d 399 (1984) 3

Oregon Waste Systems Inc. v. Oregon Dep't Envtl. Quality, 511 U.S. 93, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994) 2, 8, 9

Pike v. Bruce Church, 397 U.S. 137 (1970) 2, 7, 9, 10

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) 1, 3

Scurlock v. City of Lynn Haven, 858 F.2d 1521 (11th Cir. 1988) 6

Wyoming v. Oklahoma, 502 U.S. 437, 112 S. Ct. 789, 112 L. Ed. 2d 1 (1992) 7

Statutes Cited:

42 U.S.C. § 5401 ..... 1, 4

42 U.S.C. § 5402(6) 4, 5

Contents

	Page
42 U.S.C. § 5403	1
42 U.S.C. § 5403(8)	5
42 U.S.C. § 5403(d)	3
Tex. Rev. Civ. Stat. Ann. Art. 5221f-1 (Vernon Supp. 1997)	8

Other Authority Cited:

Notice of Internal Guidance on Preemption, 62 Fed. Reg. 3456 (Jan. 23, 1997)	4

Respondents, City of Nederland and Zoning Board of Appeals of the City of Nederland, submit this Supplemental Brief in order to address issues presented by the Amicus Curiae Brief submitted by the Manufactured Housing Institute.

SUMMARY OF ARGUMENT

Displacing state law in traditional spheres of state authority, such as zoning, by application of the preemption doctrine is done only when it is the "clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). Nothing in the legislative history of the National Manufactured Housing Construction & Safety Standards Act of 1974, § 604(d), 42 U.S.C. § 5403 (NMHCSSA) demonstrates an intent on the part of Congress to deprive the local government of their traditional zoning and police powers. According to Congress, the purpose of the NMHCSSA "is to reduce the number of personal injuries and deaths and the amount of insurance costs and property damage resulting from manufactured home accidents and to improve the quality and durability of manufactured homes." 42 U.S.C. § 5401.

The NMHCSSA precludes states from imposing construction and safety standards on manufactured homes which differ in any respect from standards developed by the Department of Housing and Urban Development (HUD). An additional indication of Congress' intent is demonstrated by the guidelines issued by HUD, the administrative entity which enforces the provisions of the Act. HUD's guideline on the preemptive reach of the NMHCSSA address local ordinances which restrict the placement of "manufactured homes" and deems them not to be preempted by the Federal Act, when all "manufactured homes" are treated the same.

Ordinance 259 is a zoning ordinance which restricts the placement of *all* manufactured homes to mobile home parks and mobile home subdivisions in order to protect property values; it does not set safety or construction standards. Since the NMHCSSA will only preempt state law if the law differs from standards that federal law has already

set, the Federal Act by its express terms does not preempt Ordinance 259.

The Fifth Circuit was correct in its analysis of the Commerce Clause. The Court found Ordinance 259 had, if any, only an incidental effect on commerce. Under this Court's precedent, in order to discriminate against interstate commerce a local or state regulation must treat in-state and out-of-state economic interests differently so as to benefit the in-state interest and burden the out-of-state interest. *Oregon Waste Systems Inc. v. Oregon Dep't Envtl. Quality*, 511 U.S. 93, 114 S. Ct. 1345, 1350, 128 L. Ed. 2d 13 (1994). The evidence demonstrated Ordinance 259 treats HUD-Code manufactured homes built in-state identically to those built out-of-state. While Petitioners, as well as Amici, argue the ordinance benefits an in-state interest (modular housing) and burdens an out-of-state interest (manufactured housing), the record fails to support this argument. Manufactured housing is built on a permanent chassis, but modular housing is not. Once the Court made the determination that Ordinance 259 had, if any, only an incidental effect on interstate commerce, the Court then applied the analysis found in *Pike v. Bruce Church*, 397 U.S. 137 (1970) to the facts in this case.

In order to apply the balancing test found in *Pike*, the Fifth Circuit looked at whether the alleged burden on interstate commerce was clearly excessive to the local interest served by the ordinance. The record below did not demonstrate a clear burden on interstate commerce, while the evidence clearly demonstrated the haphazard placement of manufactured housing within the City would have a negative impact on the property values of the area. Therefore, the Fifth Circuit correctly upheld the District Court's holding that Ordinance 259 does not violate the Dormant Commerce Clause.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD ORDINANCE 259 WAS NOT PREEMPTED BY THE NMHCSSA.

It is well settled the state's historic police powers should not be

superseded by federal laws unless that is "the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 1152, 91 L. Ed. 1447 (1947). In the areas traditionally regulated by the states through their police powers, this Court applies a presumption in favor of a narrow interpretation of an express preemption clause. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). Congress' intent in determining the scope of a preemption statute is primarily discerned from the language of the preemption statute and statutory framework surrounding it, also relevant, however, is the structure and purpose of the statute as a whole, as revealed by the text. *Medtronic, Inc. v. Lohr*, 518 U.S. __, __, 116 S. Ct. 2240, 2250, 135 L. Ed. 2d 700 (1996).

In order to make its intent clear, Congress may explicitly define the extent to which federal law will preempt state law. *Michigan Canners & Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board*, 467 U.S. 461, 469, 104 S. Ct. 2518, 2523, 81 L. Ed. 2d 399 (1984). Within the NMHCSSA, Congress expressly defines the Act's preemptive reach. The Act provides no state shall have the authority to establish "any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal Manufactured Home Construction Safety Standard." 42 U.S.C. § 5403(d).

By including the express preemption clause in the Federal Act, Congress has demonstrated its intent for the Act to preempt at least some state law. Therefore, the issue in this case is not whether Congress intended for the Act to have any preemptive effect but the intended scope of preemption. It is not disputed the NMHCSSA precludes states and local governments from establishing safety and construction standards for HUD-Code manufactured homes different from those of the Federal Act. The Federal Act does not, however, indicate a federal intent to preempt a local government's traditional ability to zone. The Act itself is most instructive of legislative intent. Congress' express intent in passing the NMHCSSA was to "reduce the number of personal injuries and deaths and the amount of insurance costs and property

damage resulting from manufactured home accidents and to improve the quality and durability of manufactured homes." 42 U.S.C. § 5401.

Any lingering ambiguity about the scope of the Act is resolved by the HUD's analysis of the preemptive scope. HUD is vested with the primary responsibility for administering and enforcing the Federal Act. Exercising this delegated authority, HUD has issued internal guidelines interpreting and applying the Federal Act to determine its preemptive effect on state and local law. With respect to the type of ordinance at issue in the present case, HUD's interpretation of the Federal Act is unambiguous: such ordinances are not preempted. (Amici Brief App. A). HUD's guidelines state:

> Generally, the enforcement of a local ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Act because such enforcement rests on the locality's right to determine proper land use. . . .
>
> A locality is not in conflict with the preemptive provisions of the Act if, without regard to construction standards, it treats all structures that meet the Federal definition of Manufactured Homes the same under local zoning laws.

Notice of Internal Guidance on Preemption, 62 Fed. Reg. 3456 (Jan. 23, 1997) (Amici Brief App. A page 5a-6a).

A manufactured home is defined by the Federal Act as:

> A structure, transportable in one or more sections, . . . which is built on a ***permanent chassis*** and designed to be used as a dwelling with or without a permanent foundation. . . .

42 U.S.C. § 5402(6). (Emphasis added)

City of Nederland's Ordinance 259 restricts the placement of manufactured homes and all other mobile homes to mobile home parks and subdivisions. Any manufactured home built with a permanent chassis may not be located outside these areas even if they meet stricter building standards. Despite Amici's unsupported statement to the contrary, the record below establishes the City of Nederland consistently and fairly enforced Ordinance 259. The City's enforcement of the ordinance is in line with HUD's internal guidelines. The City makes no exception for those HUD-Code homes which meet the local building code.

The Amici, however, argue modular housing is not subject to Ordinance 259 and such homes are manufactured homes as defined by the Act and, thus, Ordinance 259 treats manufactured homes which are built to HUD-Code standards different than manufactured homes which are not built to the federal standards. Manufactured homes, however, as defined by the Federal Act, must have a permanent chassis. Modular homes do not have a permanent chassis. The legislature in Title 42 U.S.C. § 5403(8) specifically excludes from coverage modular housing. Thus, modular housing does not meet the federal definition of manufactured homes as defined in 42 U.S.C. § 5402(6), and Ordinance 259's exclusion of modular housing does not indicate Ordinance 259 treats manufactured homes which comply with the federal standard differently than manufactured homes which do not comply with the federal standard.

The Amici argue the express preemption in the Federal Act was created purposely by Congress "to provide the uniformity requisite to nation-wide delivery of affordable, safe and high quality manufactured homes." Because the NMHCSSA preempts an area (safety) that historically has been regulated by the states through their police powers, this Court would historically construe such Act's preemption clause narrowly. *Medtronic*, 518 U.S. at __, 116 S. Ct. at 2250. The preemptive scope of the Federal Act is clearly limited to safety and construction standards and does not limit the local government's traditional zoning power to determine land usage. Ordinance 259 deals solely with land use and not with the manner in which manufactured homes are

constructed. The preemption doctrine is not applicable because the ordinance regulates where manufactured homes may be placed to maintain appearances in certain neighborhoods and to protect property values; it does not impose construction and safety standards on manufactured homes which differ from those required by federal law.

Amici further argue the Fifth Circuit's holding conflicts with the Eleventh Circuit's holding in *Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988). The Eleventh Circuit affirmed a District Court's order holding a portion of the Defendant city's municipal code was preempted by the NMHSCCA. There, the city's code imposed a zoning regulation which excluded any home from the zone in question which did not meet the Southern Standard Building Code. The court in *Scurlock* recognized muncipalities could limit the areas in which HUD-Code homes may be placed but could not require the HUD-Code homes meet standards different than those established by the NMHSCCA. *Id.* at 1525. Unlike the municipal code in *Scurlock*, Ordinance 259 does not require HUD-Code manufactured homes meet a stricter standard in order to be located within the City limits. Ordinance 259 treats all manufactured homes the same and limits there placement in order to preserve property values. Thus, the Fifth Circuit's holding does not conflict with the holding of the Eleventh Circuit.

II. THE FIFTH CIRCUIT CORRECTLY HELD ORDINANCE 259 DID NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

Amici begin their discussion concerning the Dormant Commerce Clause claim with a policy argument and in support of their argument excerpted language from the *Final Report* of the National Commission on Manufactured Housing. (Amici Brief p. 15). Amici cite the Report for the proposition that in order to meet the goals of Congress, states and localities must revise their zoning laws to include manufactured housing where other single-family housing types are permitted. However, in the report a divided government Commission recommended sweeping changes in regulations governing the mobile home industry, including extensive warranties to ensure safer and more

durable homes. The Commission recognized manufactured housing still suffers from a "trailer park" image and is perceived as being inferior to site-built housing. In order to overcome this image, the Commission recommended increased warranties against structural problems. This warranty issue was one of the recommendations which divided the Commission members. The final report was approved 10-6, with all manufactured housing industry representatives voting against it.

The Court's Dormant Commerce Clause jurisprudence seeks to strike a balance between a national market principle and an understanding of federalism in which the Commerce Clause was never intended to strip the states of power to regulate local activity, even though it is incidentally related to interstate commerce. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443-44, 80 S. Ct. 813, 4 L. Ed. 2d 852, (1960). This balance is reflected in the Court's two-tiered approach to analyzing challenged laws or actions. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79, 106 S. Ct. 2080, 90 L. Ed. 2d 552 (1986). Where the state has been motivated by discriminatory purposes or the challenged action discriminates on its face, the action is subject to a "virtually per se rule of invalidity." *Wyoming v. Oklahoma*, 502 U.S. 437, 456, 112 S. Ct. 789, 112 L. Ed. 2d 1 (1992). The burden falls on the state to show it is pursuing some legitimate purpose which cannot be achieved with a nondiscriminatory alternative. *Hughes v. Oklahoma*, 441 U.S. 322, 336, 92 S. Ct. 1727, 60 L. Ed. 2d 250 (1979). On the other hand, the *Pike* balancing test states "[w]here a statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.* 397 U.S. 137, 142 (1970).

The analysis of the City of Nederland's Ordinance 259 starts with the selection of scrutiny: heightened scrutiny or *Pike* balancing. The Fifth Circuit held the city's land use ordinance which restricted the placement of manufactured homes within the city limits was facially neutral and not discriminatory in effect. (Petition App. B p. 17a). Amici argue the Ordinance 259, as applied, makes a distinction between HUD-

code homes and modular homes. Amici state "modular homes are made only in Texas." (Amici Brief page 16). Thus, their Dormant Commerce Clause argument is premised on the assumption that modular housing is the same as manufactured housing and is an in-state product. However, the record below does not support this assumption.

The only evidence on the issue of modular housing as an in-state product in the record below was an affidavit in which Petitioner's expert, Will Ehrle, stated he was *not aware* of any manufacturer outside of Texas that sells and ships modular homes to Texas. Additionally, he speculates that because modular homes must meet local building codes the construction and sale of modular housing is a local industry. This statement is not supported by the record below which established modular homes are required to meet the National Electrical Code and either the Uniform Building Code or the Standard Building Code. (Petition App. B p. 17a). Based on Mr. Ehrles's affidavit alone, Petitioners and now Amici argue Modular housing is an in-state product. As noted by the Fifth Circuit, it is clear Mr. Ehrle's testimony does not foreclose the possibility that modular housing is constructed out-of-state and installed in-state. (Petition App. B p. 17a). Additionally, the Fifth Circuit noted the Texas statute which regulates modular housing specifically contemplates the interstate sale and installation of modular homes. Tex. Rev. Civ. Stat. Ann. Art. 5221f-1 (Vernon Supp. 1997) (Petition App. B p. 17a). Therefore, Amici's argument that as a result of "the City's application of its ordinance, out-of-state manufacturers of HUD Code manufactured housing, who ship their homes to Texas on a regular basis, have lost a portion of their market, while Texas manufacturers of modular/industrialized homes have been protected . . ." is fatally flawed. Both the Fifth Circuit and the District Court held the record below did not support the contention that modular housing is an in-state product. (Petition App. B p. 17a, App. D p. 45a).

This Court has defined "discrimination" in the Dormant Commerce Clause context to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems Inc. v. Oregon Dep't Envtl. Quality,*

511 U.S. 93, 98 (1994). In order to discriminate against interstate commerce, not only must the local ordinance in question treat an out-of-state industry different then an in-state industry, but such treatment must result in a benefit to the in-state industry and place a burden on the out-of-state industry. Petitioner and Amici argue the record below presented evidence sales of manufactured homes are harmed by Ordinance 259's restriction of these homes to mobile home parks and subdivisions. However, both the District Court and Fifth Circuit held the record below failed to demonstrate how the supposedly in-state industry of modular housing was benefited by the ordinance. (Petition App. B p. 18a, App. D p. 45a). The Fifth Circuit stated "plaintiff's own evidence demonstrates that the markets for modular homes and for HUD-code manufactured homes, though overlapping, are basically distinct. . . . There are two markets at work, and plaintiffs have not presented evidence demonstrating that restriction on HUD-code manufactured homes will result in a corresponding increase in sales of modular homes." (Petition App. B p. 18a). Thus, the Court supported the District Courts holding that Ordinance 259 had if any, only an incidental effect on interstate commerce and was therefore subject to the *Pike* analysis.

Amici argue the Fifth Circuit erred in upholding the District Court's application of the *Pike* analysis because the court failed to require the City to demonstrate a less burdensome alternative. (Amici Brief p. 17). However, the *Pike* balancing test does not require such a showing. Only if the challenged activity has been motivated by discriminatory purposes or the challenged action discriminates on its face or in its practical effect does the burden fall on the state to show it is pursuing some legitimate purpose which cannot be achieved with a nondiscriminatory alternative. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Where, as in the present case, the challenged action "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970). The local benefit is significant:

preserving the value of the largest investment most citizens of this country ever make — their home.

Amici cite an unreported District Court case, *Georgia Manufactured Housing Association v. Spalding County, Ga.*, No. 3:94-CV-51-GET (N.D. Ga., unreported, June 13, 1996), *reh'g denied*, (N.D. Ga., unreported, Feb. 6, 1997), in which they assert the court applied the *Pike* balancing test to find an ordinance violated the Dormant Commerce Clause due to its requirement that HUD-code homes have pitch roofs. Amici quote the court in *Spalding*, as stating "when a challenged regulation imposes *substantial* economic burdens on both intrastate and interstate commerce . . . , the local benefits . . . must be great. . . ." (emphasis added). It appears clear from the quoted language the facts in *Spalding* were significantly different then the facts in the present case. The evidence in this case does not demonstrate the challenged regulation resulted in a substantial burden on commerce. Additionally, the local interest involved here, protection of property values, is integral to the protection of the general welfare. The Fifth Circuit found Petitioners failed to produce evidence sufficient to create a genuine issue of material fact "with respect to whether the burden on interstate commerce clearly exceeds the local benefits." (Petition App. B p. 19a). Thus, the Court correctly upheld the District Court's granting of summary judgment for Respondents on Petitioner's Dormant Commerce Clause claim.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Respondents' Brief in Opposition, this Court should deny the Petition for Writ of Certiorari.

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In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Petitioners,

vs.

CITY OF NEDERLAND and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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12 pp

TABLE OF CONTENTS

Page

I. - Where A Municipality's Regulatory Scheme Has The Effect Of Encroaching Upon An Area Expressly Reserved By Congress, A Showing That The Municipality Intended To Create The Effect Is Not A Necessary Element Of A Preemption Violation. 1

II. Where A Facially Neutral Statute Discriminates Against Interstate Commerce In Its Practical Effect, Proof Of Protectionist Intent Is Not Required In Order To Establish Discrimination Under The Dormant Commerce Clause. 6

III. Where There Is Evidence Of A Burden On Interstate Commerce And Less Burdensome Alternatives To Achieve The State's Purpose, Summary Judgment Is Inappropriate To Dispose Of A Dormant Commerce Clause Challenge. .. 8

Conclusion 9

TABLE OF CITATIONS

Cases Cited:

Blue Circle Cement, Inc. v. Board of County Commissioners, etc., 27 F.3d 1499 (10th Cir. 1994) 8

Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., __ S.Ct. __, 1997 WL 255351 (1997) 7, 8, 9

Contents

	Page
City of New Orleans v. Dukes, 427 U.S. 297 (1976) ..	9
Cotto Waxo Company v. Williams, 46 F.3d 790 (8th Cir. 1995)	8, 9
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)	6
Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, 511 U.S. 93 (1994)	6
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	8, 9
Scurlock v. City of Lynn Haven, Fla., 858 F.2d 1521 (11th Cir. 1988)	1, 4, 5
Statutes Cited:	
42 U.S.C. § 5401 *et seq.*	3
42 U.S.C. § 5403(d)	1, 3, 4, 5
Other Authorities Cited:	
118 Cong. Rec. 17,217 (1972)	3
41 Fed. Reg. 24,968 (1976)	3
Notice of Internal Guidance on Preemption, 62 Fed. Reg. 3456 (1997)	4

Petitioners herewith submit their Reply to Respondents' Brief in Opposition, as follows:

I.

WHERE A MUNICIPALITY'S REGULATORY SCHEME HAS THE EFFECT OF ENCROACHING UPON AN AREA EXPRESSLY RESERVED BY CONGRESS, A SHOWING THAT THE MUNICIPALITY INTENDED TO CREATE THE EFFECT IS NOT A NECESSARY ELEMENT OF A PREEMPTION VIOLATION.

One question presented to this Court is whether "bad motive" is a necessary element of a preemption violation. This Court has never been called upon to decide this question, a point which Respondents completely ignored in favor of arguing this case on the merits. In most preemption cases, the issue of intent is largely superfluous, and the primary issue at trial is whether the actions taken by the offending party fall within the scope of the preemption. This case is unusual because there is no dispute about the scope of 42 U.S.C. § 5403(d).[1] Instead, an issue presented by this appeal is whether an aggrieved party must show that the particular effects which give rise to a preemption claim were specifically *intended*. In the context of this case, the Fifth Circuit put the question thusly: did Nederland *intend* for its regulatory scheme to have the effect of imposing the local building code on HUD-certified manufactured housing? Petitioners maintain that intent is irrelevant in preemption analysis, and that even the legitimate exercise of the police power must be curbed if the regulation under review has the same effect as purposeful encroachment upon an area reserved by Congress.

---

1. Respondents apparently concede that § 5403(d) is violated if a municipality explicitly requires all housing structures to meet the local building code. *See, e.g., Scurlock v. City of Lynn Haven, Fla.*, 858 F.2d 1521 (11th Cir. 1988).

Respondents added little, if anything, to this discussion. They merely assume that "bad motive" is a necessary element of a preemption violation, and, to show that Nederland lacks the requisite intent, they claim that Nederland's exclusion of HUD-certified manufactured housing is not motivated by factors which come within the exclusive domain of Congress (*i.e.*, safety, construction). Ultimately, it will be for this Court to decide whether "bad motive" is truly necessary to establish a preemption violation.

Respondents spent the remainder of their Brief arguing this case on the merits. They did so primarily by attacking the factual premise which underlies Petitioners' preemption claim, *viz.*, that the only meaningful distinction between a HUD-certified manufactured home and a "modular" home is the standard to which each is constructed.[2] Respondents took exception to this premise, labelling it as a "misstatement of fact" (p. 3). According to Respondents (p. 3), there are allegedly two other features which distinguish a HUD-certified manufactured home from a modular home: a HUD-certified manufactured home (1) is built on a permanent chassis; and (2) is therefore mobile. The chassis feature, however, is not unique to manufactured housing and, therefore, cannot truly be considered a "distinguishing" characteristic. There is no law — state or federal — which prevents a modular home from being built on a permanent chassis. As early as 1976, the Department of Housing and Urban Development recognized "that some structures that have traditionally been considered to be modular homes are now sometimes being manufactured with and transported on

2. Strangely, Respondents chastise Petitioners (p. 3) for failing to cite evidence in support of this premise even though (1) the premise as worded here is taken virtually verbatim from the Affidavit of Will Ehrle, President and General Counsel of Petitioner Texas Manufactured Housing Association, Inc., which Affidavit was submitted as part of Petitioners' summary judgment evidence (R. 701, 703); and (2) Respondents do not deny the claim that the two types of factory-built housing can be visually indistinguishable.

permanent chassis similar to those used to transport [manufactured] homes." 41 Fed. Reg. 24,968 (1976). The second feature, mobility, is also not a black-and-white issue. Many manufactured homes, including the one proposed by Mr. Waller in this case (R. 715), are installed on the same types of *permanent* foundation systems utilized for modular housing. When a manufactured home is installed in such a manner, it has the same degree of permanence as a modular home.

Petitioners' preemption claim is that Nederland's exclusion of HUD-certified manufactured housing, when combined with its ready acceptance of modular housing,[3] has the *effect* of linking its acceptance of factory-built housing upon compliance with the local building code, a requirement which is tantamount to imposing a different building code on HUD-certified manufactured housing in violation of § 5403(d). Respondents seem to argue that Nederland, in the exercise of its power to zone, has the unfettered right to exclude HUD-code manufactured homes from individual lots, even if the exclusion stems from a preference for structures built to the locally sanctioned building code. However, Nederland's right to regulate HUD-code manufactured homes is subordinate to the broad purposes of the National Manufactured Housing Construction and Safety Standards Act of 1974 (NMHCSSA), 42 U.S.C. § 5401 *et seq.* Under NMHCSSA, Congress placed the entire manufactured housing industry under HUD's control and superintendence. In contrast to Respondents' characterization of NMHCSSA as merely a safety initiative, Senator Bill Brock, NMHCSSA's sponsor, declared that the "thrust" of NMHCSSA is to "promot[e] the use of the [manufactured] home as a low cost, desirable form of housing." 118 Cong. Rec. 17,217 (1972).

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3. Nederland's acceptance of modular housing is particularly egregious since the broad definition of "trailer coach" in Ordinance 259 (App. B, 4a) draws no distinction between modular housing and manufactured housing and arguably applies to *both* types of factory-built housing.

This broad policy statement has recently been reaffirmed by HUD. In January 1997, HUD issued its *Notice of Internal Guidance on Preemption*, 62 Fed. Reg. 3456 (1997). In the *Notice*, HUD declared that

> a locality cannot accept structures meeting the Federal definition of manufactured homes which comply with different standards, such as the local or State Building Code, and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal standards. By excluding or restricting only manufactured homes built to the Federal standards, and accepting manufactured homes built to other codes, the locality is establishing standards different than the Federal standards.

62 Fed. Reg. 3457 (1997). This position was amplified in HUD's Statement of Policy 1997-1, which was published ten days after Petitioners submitted their Petition: "a locality cannot exclude or restrict manufactured homes that meet the Federal standards if the locality accepts manufactured homes meeting other standards." 62 Fed. Reg. 24338 (1997).

The position taken by HUD on the scope of § 5403(d) is supported by decisions from various federal courts. *See, e.g., Scurlock v. City of Lynn Haven, Fla.*, 858 F.2d 1521 (11th Cir. 1988) (local requirement that all housing structures must meet the local building code is tantamount to imposing different construction standards on HUD-code manufactured homes in violation of § 5403(d)).[4]

---

4. Respondents contend (p. 8) that this case is distinguishable from *Scurlock v. City of Lynn Haven, Fla.*, 858 F.2d 1521 (11th Cir. 1988). They (Cont'd)

Nederland's ordinance, as enforced, has the effect of imposing a different set of construction standards on HUD-code manufactured housing in violation of § 5403(d), an effect that replicates the effect caused by an ordinance which facially requires all housing structures either to meet the local building code or suffer exclusion. That this effect is unintended should be irrelevant where the supremacy of federal law is at stake.

(Cont'd)
argue that, in *Scurlock*, the only impediment to siting a HUD-code manufactured home on a privately owned lot was an ordinance which required all structures to be built to the local building code. Here, Respondents assert, the Fifth Circuit found other "impediments" in the form of "other applicable local regulations" (App. B, 11a). According to the Fifth Circuit, even if a HUD-code manufactured home complies with the local building code, it still cannot be placed on a privately owned lot in Nederland because Ordinance 259 excludes HUD-code manufactured homes in such areas (App. B, 11a). Since Ordinance 259 itself is being challenged as effectively linking the issue of acceptance/exclusion to compliance with the local building code, the Fifth Circuit's reasoning is entirely circular.

Oddly, the Fifth Circuit's opinion (App. B, 11a) can also be read to suggest that the summary judgment evidence somehow fails to prove what all parties readily acknowledge, *viz.*, that Nederland's building code, in fact, differs from the HUD code. This point has never been in dispute. In their depositions, the transcripts of which were submitted by Petitioners as part of their summary judgment evidence, Nederland officials testified that HUD-code manufactured homes do not meet the local building code (R. 1643-44, for example). Petitioners also commissioned a side-by-side comparison of Nederland's building code (the Standard Building Code) and the HUD code. The 177-page study, too, was submitted as part of Petitioners' summary judgment evidence (R. 892-1069).

II.

WHERE A FACIALLY NEUTRAL STATUTE DISCRIMINATES AGAINST INTERSTATE COMMERCE IN ITS PRACTICAL EFFECT, PROOF OF PROTECTIONIST INTENT IS NOT REQUIRED IN ORDER TO ESTABLISH DISCRIMINATION UNDER THE DORMANT COMMERCE CLAUSE.

Another question presented to this Court is whether discrimination that is not motivated by protectionist intent still qualifies as discrimination for purposes of the Dormant Commerce Clause.[5] Respondents disagree (p. 14), but they cannot escape the fact that the Fifth Circuit is looking for "something more" when it holds that conduct which otherwise fits the discrimination model articulated in *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality*, 511 U.S. 93, 99 (1994), does not qualify as discrimination under the Dormant Commerce Clause. That the Fifth Circuit is looking for protectionist intent is revealed each and every time the court refers to Ordinance 259 as merely a "land use" regulation as opposed to, say, a local measure aimed at giving a competitive advantage to the local modular homebuilding industry.

In another attempt to argue this case on the merits at the petition stage, Respondents assert (pp. 12, 15, 18) that Petitioners failed to show that, in response to Nederland's exclusion of HUD-code manufactured homes from individual lots,

5. This Court has never been called upon to decide this question. Respondents disagree (pp. 11-12), citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981). While it is true that Minnesota's ban on plastic milk containers was motivated by non-protectionist reasons, this Court found that the ban was not discriminatory. It goes without saying that the absence of discrimination in *Clover Leaf* made unnecessary any determination of the types of discrimination, if any, which are not actionable under the Dormant Commerce Clause.

prospective buyers would turn to products generated by an intrastate industry. On the contrary, Petitioners showed that (1) prospective buyers of HUD-code manufactured homes could and would turn to modular housing;[6] and (2) in Texas, the modular housing industry is an in-state industry. Respondents take exception to this latter characterization, even though the only *evidence* on this point was submitted by Petitioners.[7]

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6. Curiously, this point was disputed, not by Respondents, but by the Fifth Circuit, which speculated that HUD-code manufactured homes and modular homes do not compete for the same customers because modular homes are generally more expensive. 101 F.3d at 1103 (App. B, 18a). This conjecture is contradicted by the affidavit testimony of Waldo Luedemann, Petitioners' expert, who testified that HUD-code manufactured homes and modular homes are sold side-by-side at the same retail establishments (R. 772). Furthermore, the Fifth Circuit's argument is of limited utility since some buyers can afford *both* types of homes (R. 832-43).

Finally, Petitioners do not have to prove, as the Fifth Circuit suggests, that a "restriction on HUD-code manufactured homes will result in a corresponding increase in sales of modular homes." 101 F.3d at 1103-04 (App. B, 18a). As was pointed out recently by this Court in *Camps Newfound/ Owatonna, Inc. v. Town of Harrison, Me.*, __ S.Ct. __, 1997 WL 255351 *10 n.15 (1997), demanding this level of cause-and-effect precision "misconstrues the proper analysis."

7. In his Affidavit which was submitted as part of Petitioners' summary judgment evidence, Will Ehrle, the President and General Counsel of Petitioner Texas Manufactured Housing Association, Inc., testified that the modular housing industry in Texas is an *intrastate* industry: the modular homes being purchased by Texas consumers are built exclusively in Texas (R. 701).

III.

WHERE THERE IS EVIDENCE OF A BURDEN ON INTERSTATE COMMERCE AND LESS BURDENSOME ALTERNATIVES TO ACHIEVE THE STATE'S PURPOSE, SUMMARY JUDGMENT IS INAPPROPRIATE TO DISPOSE OF A DORMANT COMMERCE CLAUSE CHALLENGE.

Respondents failed to address another question presented to this Court, *viz.*, whether the intensely factual nature of the third component of the undue burden test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) — the availability of less burdensome alternatives — makes summary disposition wholly inappropriate.[8] Doubtless, the *Pike* test requires courts to make quasi-legislative policy decisions. *See Camps Newfound/ Owatonna, Inc. v. Town of Harrison, Me.*, __ S.Ct. __, 1997 WL 255351 *28-29 (1997) (Thomas, J., dissenting). Since they are making policy decisions, some courts are content to do the requisite balancing at the summary judgment level, while others are reluctant to do so without a fully developed record.[9] This

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8. Incredibly, Respondents maintain (pp. 17-18) that the Fifth Circuit applied the *Pike* test correctly, even though the Fifth Circuit failed to analyze whether Nederland has other ways to maintain property values without burdening interstate commerce.

9. Although Respondents disagree, the cases cited by Petitioners support the proposition that some courts of appeals are reluctant to make any type of policy decision at the summary judgment level. For example, in *Blue Circle Cement, Inc. v. Board of County Commissioners, etc.*, 27 F.3d 1499 (10th Cir. 1994), the court acknowledged that the "putative local interest [ ] is the health and safety of the County's residents." *Id.* at 1512. Armed with this purpose, the court nevertheless refused to make a policy decision, finding that "the record [ ] is inadequate to support a summary judgment for the Board." *Id.* Similarly, in *Cotto Waxo Company v. Williams*, 46 F.3d 790 (8th

(Cont'd)

Court should establish a uniform procedure for federal courts to follow when applying the *Pike* test.

Finally, Respondents contend (p. 13) that the *Pike* undue burden test is a "rational basis review balancing test." This statement, of course, has no support in the law.[10]

CONCLUSION

The petition for a writ of certiorari should be granted for the reasons stated therein and hereinabove.

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(Cont'd)
Cir. 1995), the court, after acknowledging the benefits and burdens of the challenged statute, found that summary judgment was inappropriate and held that "[t]he constitutionality of the Act should be tested at trial." *Id.* at 795.

10. *See City of New Orleans v. Dukes*, 427 U.S. 297, 304 n.5 (1976) (unlike equal protection and due process analysis, "[v]ery different principles" are used "when constitutional provisions such as the Commerce Clause are implicated"). The rational basis test does not involve any "balancing" at all; instead, the courts merely discern whether any legitimate purpose could "conceivably" be served by the legislative action under review. In contrast, the *Pike* test requires courts to make quasi-legislative policy decisions. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, __ S.Ct. __, 1997 WL 255351 *28-29 (1997) (Thomas, J., dissenting).

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Petitioners,

vs.

CITY OF NEDERLAND and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION OF THE MANUFACTURED HOUSING INSTITUTE FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION AND BRIEF *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

The Manufactured Housing Institute (MHI) respectfully moves this Court, pursuant to Supreme Court Rule 37.2, for leave to file the brief submitted herewith, as *amicus curiae* in support of Petitioners Texas Manufactured Housing Association, Inc. and A.J. Waller, Sr.'s Petition for a Writ of Certiorari. Petitioners have consented to the filing of this brief, but Respondents have withheld consent.[1] A copy of the proposed *amicus curiae* brief is attached.

The *amicus* Manufactured Housing Institute (MHI) is an Illinois not-for-profit corporation headquartered in Arlington, Virginia, which represents manufacturers, suppliers, retailers, lenders, community owners, state manufactured housing associations, and private third party inspection agencies nationwide — all segments of the manufactured housing industry. The Petitioner, the Texas Manufactured Housing Association (TMHA), is a state manufactured housing association member of MHI. MHI currently represents associations in 48 states. MHI's membership produces approximately seventy percent (70%) of the total production of the industry.[2]

---

1. Petitioners have consented to the filing of this brief of the Manufactured Housing Institute as *amicus curiae*, which consent is on file with the Court. In response to a request for consent by Respondents to the submission of this *amicus curiae* brief, Respondents' counsel replied by letter dated May 14, 1997 "[w]e are not aware of any relevant matter not already brought to the attention of the Supreme Court, we strongly disagree with the matters raised in your Petition for Writ to the Supreme Court, and we do not give our consent for an *amicus* brief when it would serve no purpose at this stage of the proceedings."

2. Information gathered by the National Conference of States on Building Codes and Standards.

Because MHI was involved in the development of a voluntary national industry standards and inspection system prior to the passage of the National Manufactured Housing Construction and Safety Standards Act (NMHCSSA) as well as with the passage of the NMHCSSA, MHI is in a unique position to provide the Court with the historical perspective on the inclusion in the NMHCSSA of the express preemption provision. MHI is also well-positioned to address the questions presented in the Petition for a Writ of Certiorari from the broad industry perspective, not provided in the Petitioners' brief.

MHI is submitting this Brief because of its concern for the adverse impact that the Fifth Circuit Court of Appeals' ruling will have on the ability of a large class of consumer-citizens to become homeowners, and on the ability of the industry to continue to produce affordable housing. In 1996 one out of three new single family homes purchased was a manufactured home.[3] Because of the nationwide production and shipment of manufactured homes, it is vital to preserve the uniformity and consistency of the Federal standards to provide the nation's only non-subsidized affordable housing.

MHI believes this *amicus curiae* brief can assist the Court in ascertaining the national adverse impact of the Fifth Circuit's ruling on the manufactured housing industry, with respect to both the preservation of Federal preemption and the Commerce Clause. The Fifth Circuit's decision seriously undermines the industry's national production and shipment of manufactured homes, as well as the Federal standards and enforcement system, which runs counter to the intent of Congress. The Fifth Circuit decision will adversely affect the entire industry and the Nation's housing stock by increasing the cost of manufactured housing and reducing its availability.

---

3. Manufactured Housing Institute, *Customer Demand Pushing Record Industry Shipments*, Housing Currents (Winter 1997).

As one of the National Partners in Homeownership, coordinated by the United States Department of Housing and Urban Development (HUD), MHI has worked with the other partners and HUD to identify ways to eliminate barriers to the expanded use of affordable housing, which specifically includes manufactured homes. Through this effort, MHI has a strong interest in the negative impact that the Fifth Circuit's decision upholding Nederland's exclusionary ordinance has on accomplishing this objective. In HUD's recent *Manufactured Housing: Statement of Policy 1997-1, State and Local Zoning Determinations Involving HUD-Code*, at 62 Fed. Reg. 24337 (May 5, 1997) (App. B), HUD emphasizes the importance of manufactured housing in meeting its partnership effort to increase homeownership. HUD explicitly states that it issued the *Statement of Policy* "as an initial step in the elimination of barriers to the use of manufactured housing and in furtherance of the goals and objectives of the National Homeownership Strategy." *Id.* This recent *Statement of Policy*, in addition to HUD's prior *Notice of Internal Guidance on Preemption*, 62 Fed. Reg. 3456 (Jan. 23, 1997) (App. A), which are discussed in MHI's *amicus* brief, set forth HUD's interpretation of the preemptive provision in the NMHCSSA and directly address the type of discrimination against HUD Code manufactured housing practiced in the City of Nederland. Neither of these recent HUD preemption interpretations were discussed in the Petitioners' brief.

In light of the foregoing, it is respectfully requested that this Court grant leave to file the attached brief of the MHI *amicus*.

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TABLE OF CONTENTS

	Page
Table of Citations	ii
Statement of Interest	1
Summary of Argument	3
Argument	5
I. The Fifth Circuit Erred By Failing To Hold That Ordinance 259 Effectively Establishes A Local Standard In Contravention Of the Express Preemption Of The NMHCSSA.	5
A. Congress Provided for Express Preemption of State and Local Law in the NMHCSSA.	6
B. HUD Has Established a Preemptive Regulatory System Which Prohibits Zoning Ordinances from Imposing Different Standards.	9
C. The Fifth Circuit Failed to Consider the Ordinance's Effects Which are Expressly Preempted by Congress.	13
II. The Fifth Circuit Failed To Follow This Court's Established Precedent By Allowing A Statute With Nondiscriminatory Language To Rebut A Valid Commerce Clause Claim.	15
A. The Dormant Commerce Clause Plays a Critical Role for Manufactured Housing. .	15

Contents

Page

B. Nederland's Ordinance 259 Unconstitutionally Burdens Interstate Commerce. 16

C. The Fifth Circuit Misapplied the *Pike* Test. 17

Conclusion 18

TABLE OF CITATIONS

Cases Cited:

Georgia Manufactured Housing Association v. Spalding County, Ga., No. 3:94-CV-51-GET (N.D. Ga., unreported, June 13, 1996), *reh'g denied,* (N.D. Ga., unreported, Feb. 6, 1997) 17

Georgia Manufactured Housing Association v. Spalding County, Ga., reh'g denied, No. 3:94-CV-51-GET (N.D. Ga., unreported, Feb. 6, 1997) 18

Hughes v. Oklahoma, 441 U.S. 322 (1979) 16, 19

National Solid Waste Management Ass'n v. Alabama Dept. of Envtl. Management, 910 F.2d 713 (11th Cir. 1990) 18

Oregon Waste Systems, Inc. v. Dept. of Envtl. Quality, 511 U.S. 93, 114 S. Ct. 1345 (1994) 16, 19

Contents

Page

Pike v. Bruce Church, 397 U.S. 137 (1970) 5, 17, 18, 19

Scurlock v. City of Lynn Haven, 858 F.2d 1521 (11th Cir. 1988) 4, 12, 13, 19

Texas Manufactured Housing Association (TMHA) v. City of Nederland, 101 F.3d 1095 (5th Cir. 1996) ...11, 13, 16

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15 U.S.C. § 1392 6

42 U.S.C. § 5403(a) 8

42 U.S.C. § 5403(d) 6, 18

42 U.S.C. § 5403(h) 10

National Manufactured Housing Construction and Safety Standards Act (NMHCSSA), 42 U.S.C. §§ 5401-5426 ..... *passim*

24 C.F.R. Part 3282 ..... 1, 9

24 C.F.R. § 3280.1 8

24 C.F.R. § 3282.11 9

24 C.F.R. § 3282.11(c) 9

24 C.F.R. § 3282.11(d) 9, 14

24 C.F.R. § 3282.12 10

Contents

Page

United States Constitution:

Commerce Clause, U.S. Const. art. I, § 8, cl. 3 ..... *passim*

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ANSI A119.1 for Mobile Homes — Body and Frame Design and Construction: Installation of Plumbing, Heating, and Electrical Systems 7

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Committee on Housing and Urban Affairs, S. Doc. No. 1348, 93d Cong., 1st Sess. (1973) 7

Manufactured Housing Institute, *Manufacturing Report*, 23-24 (Dec. 1996) 2

Manufactured Housing: Statement of Policy 1997-1, State and Local Zoning Determinations *Involving HUD-Code*, 62 Fed. Reg. 24337 (May 5, 1997) 9, 11, 12, 13, 14, 19

National Commission on Manufactured Housing, *Final Report* (Aug. 1, 1994) 7, 8, 15

Notice of Internal Guidance on Preemption, 62 Fed. Reg. 3456 (Jan. 23, 1997) 9, 10, 11, 14, 19

Contents

Page

APPENDIX

Appendix A — Federal Register Dated January 23, 1997 (Volume 62, Number 15) 1a

Appendix B — HUD Statement of Policy 11a

BRIEF OF THE MANUFACTURED HOUSING INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Manufactured Housing Institute[1] submits this brief as *amicus curiae*, and respectfully suggests that this Court grant the Petition, and reverse the decision below.

STATEMENT OF INTEREST

MHI, a national trade association represents all aspects of the manufactured housing industry, with associations in 48 states. Its member manufacturers produce approximately seventy percent (70%) of the total industry production.

MHI is able to provide this Court with its broad industry and historical perspective, not provided in the Petitioners' brief. MHI, in existence since 1936, was involved in the development of a national industry standards and inspection system prior to the passage of the National Manufactured Housing Construction and Safety Standards Act of 1974 (NMHCSSA) as well as with the passage of the NMHCSSA. 42 U.S.C. §§ 5401-5426.

The Fifth Circuit Court of Appeals' decision seriously undercuts this national system. It allows state and local governments to impose standards on manufactured homes that differ from the Federal standards, in contravention of the express preemption provision in the NMHCSSA. The opinion goes against the intent of Congress as revealed by the NMHCSSA's legislative history and the regulatory framework for enforcing the standards promulgated and administered by the United States Department of Housing and Urban Development (HUD) in 24 C.F.R. Part 3282. As well, the

1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than the *amicus curiae*, its members, or counsel have made a monetary contribution to the preparation or submission of the brief.

decision seriously interferes with interstate commerce, promoting intrastate modular and site-built housing at the expense of the interstate manufactured housing industry.

MHI, on behalf of its members, believes that the maintenance and preservation of the Federal standards and enforcement system is of vital importance to the entire industry and the nation's homebuyers. Such importance is revealed by the vast interstate nature of the industry. There are a total of 313 home manufacturing plants in 33 of the 50 states with homes being shipped to all 50 states.[2] In 1996, the industry produced and shipped over 363,000 manufactured homes.[3] The retail sales of the industry are estimated by MHI to be $14 billion dollars.[4] Homes are often produced in one state and sold and installed in another state pursuant to the preemptive Federal standards and enforcement system promulgated by HUD and pursuant to the mandates of the NMHCSSA. This unique Federal program provides uniformity where chaos reigned prior to the passage of the NMHCSSA. This uniformity, provided by Federal preemption for safety and construction standards, is a key component in the affordability of manufactured homes. Unlike other types of housing which must comply with the various differing local codes, manufactured homes comply with only one national code.

MHI is particularly concerned that the Fifth Circuit's opinion provides a loophole for state and local governments to contravene the express intent of Congress. The Fifth Circuit decision allows state and local governments to include modular homes (factory-built homes that meet local building codes) and site-built homes

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2. Manufactured Housing Institute, *Manufacturing Report*, 23-24 (Dec. 1996).

3. *Id.* at 2.

4. Derived by multiplying the total number of 1996 shipments by the total average sales price of $38,500 per home.

(constructed to local building codes) while excluding manufactured homes (factory-built homes that comply with the HUD Code) from their municipal housing plans. While there is no meaningful aesthetic distinction between modular homes and manufactured homes, this decision creates a zoning scheme which would undercut the Federal regulatory program essential to the provision of quality, affordable homes manufactured throughout the nation. The danger is that states and localities will have the incentive and the means to enact such zoning plans in contravention of the preemption clause of the NMHCSSA.

In addition, such a zoning scheme results in increased housing costs which solely benefit the modular housing industry, an intrastate industry, at the expense of the manufactured housing industry, an interstate industry. Such a result would completely thwart the Commerce Clause of the Constitution and the express intent of Congress in the NMHCSSA.

SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeals' ruling undermines the express preemption provision of the National Manufactured Housing Construction and Safety Standards Act of 1974 (NMHCSSA). The court erred in its application of the law by failing to rule that the ordinance effectively establishes a local standard in direct contravention of the intent of Congress. The Fifth Circuit's ruling also abrogates the Commerce Clause of the Constitution in upholding a municipal ordinance that has disproportionate and unmitigated adverse effects on interstate commerce.

After a long history of differing state and local industry standards for manufactured housing, Congress established an expressly preemptive statute to provide uniformity. The Federal standards adopted by the Department of Housing and Urban Development are performance-based, and are enforced through an extensive regulatory system of review, inspection and oversight.

The preemptive nature of the NMHCSSA was no accident, but rather a concerted effort on the part of Congress to ensure that Federal standards would be paramount in manufactured housing.

The Fifth Circuit misapplied case law and the provisions of the NMHCSSA in its ruling. The express preemption provision dictates that a locality cannot impose a different standard on manufactured housing. The Fifth Circuit found that because the Nederland ordinance did not by its own language show a conflict with the Federal standards, it was not preempted. However, the Fifth Circuit erred in requiring a conflict to be expressly linked to the language of an ordinance. Such a clear statement of intent is not a prerequisite to preemption. The preemptive provision of the NMHCSSA does not provide that intent is in any way relevant to the determination of whether a state has established a standard different from the Federal standards. As well, the Fifth Circuit's interpretation directly conflicts with the Eleventh Circuit's established interpretation that the effects of regulation are relevant in determining whether preemption applies. *Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988). After the Fifth Circuit decision was issued, HUD issued preemption guidelines which address its interpretation of local ordinances, such as Nederland's, and deems them to be preempted by the NMHCSSA. States and municipalities cannot be allowed to circumvent the intent of Congress by promulgating a zoning ordinance that on its face does not impose state or local standards on manufactured homes, but by the ordinance's application does impose differing standards on the construction and safety of manufactured homes.

The Fifth Circuit also erred in its analysis of the Commerce Clause. The court found that the zoning ordinance was by its language neutral because manufactured homes are manufactured in Texas and the legislature did not foreclose the possibility of modular homes being manufactured outside of Texas. However, this ruling ignores the actual effects of the ordinance and directly conflicts with precedents established by this Court. The zoning

ordinance has a discriminatory effect; it favors the local modular housing industry at the expense of the interstate manufactured housing industry and imposes an unconstitutional burden on interstate commerce.

In addition, if the Fifth Circuit is found to be correct in applying the *Pike v. Bruce Church*, 397 U.S. 137 (1970), balancing test to determine if there is a violation of the Dormant Commerce Clause, it misapplied this test. The Fifth Circuit did not require Nederland to show an absence of less burdensome alternatives and that the local benefits were great enough to offset the substantial economic burdens imposed on interstate commerce.

The Fifth Circuit's analysis of preemption and the Commerce Clause thwarts Congress' establishment of uniform Federal standards for manufactured housing. The United States Supreme Court should look to its prior rulings that recognize the importance of upholding Congress' intent and of maintaining the freedom of interstate commerce. It should not let stand a ruling that adversely impacts the affordability of housing for a large population of low and moderate income families that Congress explicitly intended to benefit.

ARGUMENT

I.

THE FIFTH CIRCUIT ERRED BY FAILING TO HOLD THAT ORDINANCE 259 EFFECTIVELY ESTABLISHES A LOCAL STANDARD IN CONTRAVENTION OF THE EXPRESS PREEMPTION OF THE NMHCSSA.

The National Manufactured Housing Construction and Safety Standards Act of 1974 (NMHCSSA) contains an express preemption provision, which indicates clear Congressional intent to establish Federal manufactured housing standards (the HUD

Code) and an accompanying enforcement system that overrides state and local manufactured housing standards. 42 U.S.C. § 5403(d). Such an explicit provision is distinct from the other forms of preemption recognized under Federal law. The legislative history of the NMHCSSA and the regulatory framework adopted by HUD to implement the NMHCSSA demonstrate both the reasons for adopting this Federal preemptive system and the importance of maintaining it. HUD has established in its regulations and guidelines interpreting the Act's express preemption, that a locality lacks authority to exclude manufactured homes through zoning enforcement that is based on a local code different from the HUD Code. Thus, the Fifth Circuit erred in refusing to examine whether the ordinance has the effect of imposing different standards on HUD Code factory-built homes, which is preempted by the Act.

A. Congress Provided for Express Preemption of State and Local Law in the NMHCSSA.

In the National Manufactured Housing Construction and Safety Standards Act of 1974, Congress set forth its express intention for the Federal standards to preempt state and local law. 42 U.S.C. § 5403(d). For Congress to expressly preempt state and local law as it has in the NMHCSSA is unusual, and must be interpreted as a strong indication of Congressional intent to establish a single, Federal standard. The preemption language of the NMHCSSA is modelled after similar language in the National Traffic and Motor Vehicle Safety Act of 1966. 15 U.S.C. § 1392. In both of these cases, because of the particular interstate commerce concerns for automobiles and manufactured homes, Congress saw the need for Federal preemptive standards to provide for uniformity and rejected weaker, less restrictive options. For example, the original House version of the NMHCSSA, introduced in 1972, contained a much less comprehensive preemption clause. The House bill would have allowed state or local codes to be equal to or more stringent than the Federal standards. Senator Brock introduced similar legislation in the Senate that required state or local codes to be *only* equal to

the Federal code, and in 1973 Senator Proxmire introduced a bill that would have permitted states to adopt higher standards than the Federal code. However, the final Senate version prohibited state and local standards that were not identical to the Federal standards, but allowed state handling of any issue for which there was no Federal standard. *See* Committee on Housing and Urban Affairs, S. Doc. No. 1348, 93d Cong., 1st Sess. 1221-22 (1973). In recognition of the less mobile nature of modern factory-built homes, Congress changed the name of the "mobile home" to "manufactured home" in the NMHCSSA in 1980. National Commission on Manufactured Housing, *Final Report* 19-20 (Aug. 1, 1994).

To recognize the importance of preemption to the regulation of manufactured housing, a brief overview of the history of this regulation prior to the passage of the NMHCSSA is useful. The manufactured housing industry's origins date back to the factory-assembled travel trailers of the 1920's. Safety standards for manufactured homes did not exist in the earliest years. By the 1950's, some municipalities imposed local code requirements on manufactured homes either to improve their quality or to ban them outright. This led the industry to develop its own standards. By 1963, a standard was published by the American National Standards Institute (ANSI) in association with the manufactured housing industry and the National Fire Protection Association (NFPA). In 1969, this standard — ANSI A119.1 for Mobile Homes — Body and Frame Design and Construction: Installation of Plumbing, Heating, and Electrical Systems — was expanded to include body and frame construction provisions. Arthur D. Bernhardt, *Building Tomorrow: The Mobile/Manufactured Housing Industry* 377 (1980).

Amicus Manufactured Housing Institute (MHI), formerly the Mobile Home Manufacturers Association (MHMA), required its members to comply with ANSI A119.1, and had inspectors conducting in-plant inspections. The *amicus* also encouraged states to recognize and adopt ANSI A119.1. *Final Report* at 19. By 1974, 45 states had adopted some version of the ANSI standards. However,

there was a wide variance in these state standards. Besides the lack of uniformity in the state standards, there was also a vast difference in the state enforcement programs. Some states, like California and North Carolina, had effective enforcement programs while some had no inspection or enforcement mechanism. *Id.* As pointed out by the National Manufactured Housing Commission:

> State-by-State variations made it difficult for the industry to build homes that were uniform and prevented full interstate reciprocity. Multiple inspections of the same unit raised costs, and in up to 10 states no regulations at all governed manufactured home construction.

Id. In the early 1970's consumer organizations, particularly Ralph Nader's Center for Auto Safety, began to call for "stricter and more uniform" manufactured home standards. *Id.*

The National Manufactured Housing Construction and Safety Standards Act of 1974 mandated that the HUD Secretary adopt Federal preemptive standards that are "reasonable and shall meet the highest standards of protection, taking into account existing State and local laws relating to manufactured home safety and construction." 42 U.S.C. § 5403(a). HUD was also charged by Congress with establishing a Federal enforcement program to guarantee compliance.

The members of *amicus* Manufactured Housing Institute looked to Federal preemption to provide a single set of construction standards by which to build homes anywhere in the United States, so no different or more stringent requirements could be placed on them in different states. With such standards' uniformity, the cost of manufacturing is reduced, providing more affordability for homebuyers. Federal preemption meant that the homes could be marketed cost-effectively nationwide. As outlined in the Federal standards, 24 C.F.R. § 3280.1, the preemptive code, to the maximum

extent possible, is performance-based. The members of the *amicus* view such a code as encouraging innovation and use of different materials and techniques, which also contribute to affordability.

The express preemption of state and local law in the NMHCSSA was created purposely by Congress to provide the uniformity requisite to nationwide delivery of affordable, safe and high quality manufactured homes. This Court should not allow a decision to stand that permits a local ordinance to contravene the Federal law.

B. HUD Has Established a Preemptive Regulatory System Which Prohibits Zoning Ordinances from Imposing Different Standards.

In 1976, HUD promulgated Manufactured Home Procedural and Enforcement Regulations, 24 C.F.R. § 3282. Section 3282.11 of these regulations expressly provides for preemption of state and local standards which conflict with the Federal standards. *See* 24 C.F.R. §§ 3282.11(c) and (d). HUD's regulations clearly prohibit any state or local action that "impair[s] the Federal superintendence of the manufactured home industry." 24 C.F.R. § 3282.11(d).

HUD stated its preemptive intent even more clearly in its recent *Notice of Internal Guidance on Preemption*, 62 Fed. Reg. 3456 (Jan. 23, 1997) (App. A), and its *Manufactured Housing: Statement of Policy 1997-1, State and Local Zoning Determinations Involving HUD-Code*, 62 Fed. Reg. 24337 (May 5, 1997) (App. B). On January 23, 1997, subsequent to the Fifth Circuit decision in this case, HUD issued its *Notice of Internal Guidance on Preemption* in order to assist the HUD staff in answering questions from the public, including state and local governments, as to whether particular state or local laws are preempted by the NMHCSSA. HUD's guidelines devote section B to addressing zoning issues. In general, the guidelines provide that while state and local governments have the power to determine appropriate land use,

they are prohibited from discriminatory exclusion of manufactured homes in the way that the City of Nederland's ordinance is applied:

> If a locality, however, is attempting to regulate, and even exclude, certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different from that prescribed by the Act, the locality lacks such authority. Thus, a locality cannot accept structures meeting the Federal definition of manufactured homes which comply with different standards, such as the local or State Building Code, and exclude or restrict manufactured homes that are the same but only meet the Federal standards. By excluding or restricting only manufactured homes built to the Federal standards, and accepting manufactured homes built to other codes, the locality is establishing standards different than the Federal standards.

Notice of Internal Guidance on Preemption, 62 Fed. Reg. at 3457 (App. A, 5a-6a).

The Petitioners' brought forth testimony of the City's own officials showing that the City's interpretation of its ordinance would require manufactured homes to comply with the local building code. (R. 1643-44). Ordinance 259's broad definition of "trailer coach" can also be read to encompass modular/industrialized housing as defined under Texas law. By specifically providing for a means for industrialized/modular homes to be excluded from the coverage of the Act, Congress and HUD recognize that such homes are manufactured homes as defined by the Act. 42 U.S.C. § 5403(h) and 24 C.F.R. § 3282.12. The Fifth Circuit attempts to distinguish manufactured housing from modular housing by stating that "modular housing is not built on a permanent chassis and must be

constructed according to local building code standards" by citing to the Texas statutory definition. *Texas Manufactured Housing Association (TMHA) v. City of Nederland*, 101 F.3d 1095, 1099 (5th Cir. 1996). However, only one part of the two cited factors is found in this definition — "must be constructed according to local building code standards." *Id.* There is no prohibition in the Texas statute against building an industrialized/modular home on a permanent chassis. Therefore, HUD Code manufactured homes to be installed on permanent foundation systems fall under the definition of industrialized housing with the sole exception that they are constructed to a different standard.

The City of Nederland accepts factory-built housing that complies with its local building code and excludes factory-built housing that is built to the HUD Code. The HUD guidelines expressly provide that this zoning is preempted by the NMHCSSA because "the locality is establishing standards different than the Federal standards." *Notice of Internal Guidance on Preemption*, 62 Fed. Reg. at 3457. (App. A, 6a).

HUD also interprets the NMHCSSA as preempting zoning ordinances like the City of Nederland's in its *Statement of Policy*. HUD first explains its strong purpose "to identify and promote ways to increase homeownership and the supply of affordable housing" and specifically to encourage local governments to make sites available "for manufactured housing outside of parks and largely rural areas." *Statement of Policy*, 62 Fed. Reg. at 24337 (App. B, 13a). HUD's regulations are clearly intended to promote the affordability of manufactured homes by maintaining the uniform Federal standards. HUD then quoted the relevant preemptive provisions in the NMHCSSA, and set forth its interpretation:

> [T]he locality is without authority to regulate or exclude certain manufactured homes through zoning ordinances or enforcement decisions that are based solely on a construction and

> safety code that is different from the Federal standards prescribed under the Act.

Id. at 24338 (App. B, 15a). As well, HUD discusses an example that directly prohibits the City of Nederland's regulatory action because it establishes a standard different from the Federal standard, and because it would interfere with the Federal superintendence of the industry:

> By excluding or restricting only manufactured homes built to the Federal standards and accepting manufactured homes built to State or local codes, the locality is establishing standards for manufactured homes that are different from the Federal standards. To the extent that the provisions or enforcement of local zoning regulations require that manufactured homes meet standards other than the Federal standards for manufactured homes, those local actions are preempted by section 604(d) of the Act (42 U.S.C. 5403(d)). Furthermore, such a system of local regulation and enforcement would interfere with Federal superintendence of the manufactured home industry, in contravention of 24 C.F.R. 3282.11(d).

Id. (App. B, 16a).

The Fifth Circuit's decision contradicts the express will of Congress and HUD and the Eleventh Circuit's *Scurlock* decision, 858 F.2d 1521 (11th Cir. 1988). If the Fifth Circuit's ruling is allowed to stand, each and every locality could readily avoid the express preemption provision of the NMHCSSA simply by not stating any linkage to the Federal standards in the local ordinance, but by imposing the local code on manufactured homes through its

enforcement system. Such a result would fly in the face of the NMHCSSA and the President's National Homeownership Strategy objective "of the elimination of barriers to the expanded use of affordable housing, including manufactured homes." *Statement of Policy*, 62 Fed. Reg. at 24337 (App. B, 13a).

C. The Fifth Circuit Failed to Consider the Ordinance's Effects Which are Expressly Preempted by Congress.

The Fifth Circuit rejected the Petitioners' claim that Nederland's Ordinance 259 was preempted by the NMHCSSA. Instead, the court found that Ordinance 259, which prohibits "trailer coaches" from being sited outside "trailer parks," does not impose local construction and safety standards on manufactured homes. *TMHA*, 101 F.3d at 1100. The court held that Petitioners' failure to identify the particular local building code standards which the HUD Code manufactured homes did not meet was fatal to their claim. *Id.*

The Fifth Circuit distinguished its decision from the Eleventh Circuit's decision in *Scurlock*, 858 F.2d 1521. The Fifth Circuit determined that "this case is significantly unlike *Scurlock*." *TMHA*, 101 F.3d at 1100. The Fifth Circuit focused on the fact that the zoning ordinance in the *Scurlock* case expressly excluded homes that did not meet the building code. *Id.* Since the ordinance at issue here does not expressly differentiate between homes that meet the local building code and homes that do not, the court found there was no genuine issue of material fact regarding preemption. The court refused to go beyond the face of the statute to examine whether the City's regulatory scheme has the *effect* of imposing different standards on HUD Code homes.

The Fifth Circuit erred when it focused on the express language of the statute and its putative "locational" purpose. The City of Nederland interpreted the outdated term "trailer" in its ordinance to include manufactured homes, but not to include modular homes.

Modular housing is not barred from residential districts, even though they are factory-built homes, identical to manufactured homes except that they comply with the local building code instead of the HUD Code. Though the zoning ordinance does not on its face distinguish between manufactured and modular homes, the HUD regulations state that the NMHCSSA preempts a state or locality from "tak[ing] any action" which "impair[s] the Federal superintendence of the manufactured housing industry as established by the Act." 24 C.F.R. § 3282.11(d). The City's enforcement of the ordinance would constitute an impermissible "action" within the meaning of the NMHCSSA's preemptive provision.

To clarify that this is the agency's intended interpretation, HUD elaborates on the meaning of its regulations. Twice in the past year HUD has expressly stated that the preemptive provisions in the NMHCSSA prohibit states and localities from excluding manufactured homes while allowing other forms of factory-built homes (*i.e.*, modular homes). *See Notice of Internal Guidance on Preemption* (App. A) and *Statement of Policy* (App. B). HUD expressly stated that the Act's preemption analysis requires looking beyond the text of the zoning ordinance to see whether it is being enforced in a manner that contravenes the purpose of the NMHCSSA and its accompanying regulations, and limits the locality's ability to discriminate against manufactured homes "through zoning ordinances or enforcement decisions." *Statement of Policy*, 62 Fed. Reg. at 24338 (App. B, 15a). Therefore, the Fifth Circuit erred as a matter of law in refusing to consider Petitioners' evidence regarding the arbitrary and discriminatory manner in which City officials enforced the ordinance.

This Court should grant Petitioners' writ of certiorari to correct the Fifth Circuit's erroneous standard of preemption and maintain Federal uniformity in accordance with Congress' intent.

II.

THE FIFTH CIRCUIT FAILED TO FOLLOW THIS COURT'S ESTABLISHED PRECEDENT BY ALLOWING A STATUTE WITH NONDISCRIMINATORY LANGUAGE TO REBUT A VALID COMMERCE CLAUSE CLAIM.

Manufactured homes are often manufactured in one state and sited in another. The 313 home manufacturing plants in 33 states ship homes in interstate commerce pursuant to the preemptive Federal manufactured housing standards and enforcement system. The express preemption set forth in the NMHCSSA is based on the express power given to Congress in the Commerce Clause of the United States Constitution. The City of Nederland's exclusionary Ordinance 259 discriminates against the interstate commerce of manufactured homes while benefiting the intrastate commerce of modular homes.

A. The Dormant Commerce Clause Plays a Critical Role for Manufactured Housing.

Unlike housing that is built to state and local building codes, manufactured homes are built to one Federal code established and administered by HUD. Therefore, manufactured homes are products of interstate commerce. The NMHCSSA was specifically enacted to establish a uniform inspection and enforcement system for manufactured homes built to a uniform code because Congress recognized that these homes were typically manufactured in one state and sited in another state. Ordinances, like the subject ordinance of the City of Nederland, that exclude manufactured homes from residential areas, make housing less affordable for many households. *Final Report*, National Commission on Manufactured Housing at 69. "The affordability of manufactured housing for the consumer dictates that States and localities revise their zoning laws to include the units where other single-family housing types are permitted." *Id.*

B. Nederland's Ordinance 259 Unconstitutionally Burdens Interstate Commerce.

The City of Nederland's Ordinance 259 discriminates in its application against manufactured homes which are built to the HUD Code and transported in interstate commerce. The Fifth Circuit failed to apply the proper analysis under the Commerce Clause, which has been set forth by this Court.

It is uncontroverted that the application of Ordinance 259 had a four-year impact upon the interstate transfer of HUD Code manufactured housing of approximately $943,000. (R. 743). Thus, the Court must determine whether the Ordinance is discriminatory. *Oregon Waste Systems, Inc. v. Dept. of Envtl. Quality*, 511 U.S. 93, 114 S. Ct. 1345, 1350 (1994). Such an examination of discrimination is not limited to an examination of the mere language of the ordinance but a factual inquiry must be made to determine if the ordinance is discriminatory because of its effect. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

The Petitioners introduced uncontroverted evidence which proved that the ordinance discriminates against interstate commerce in its effect. Ordinance 259, as it is applied by the City, makes a distinction between two types of housing — HUD Code manufactured homes and modular/industrialized housing. The HUD Code homes are manufactured both in and out of Texas. The modular/industrialized homes are made only in Texas. The Fifth Circuit's conjecture on future locations of factories is specious because such is not currently the case. There are no modular home manufacturers in the nearby state of Louisiana as hypothesized by the Fifth Circuit. *TMHA*, 101 F.3d at 1103 n.8. As applied, Ordinance 259 limits the market for HUD Code homes, to the benefit of the nearest economic alternative in the marketplace, *i.e.*, the Texas-built modular/industrialized homes. As a result of the City's application of its ordinance, out-of-state manufacturers of HUD Code manufactured housing, who ship their homes to Texas

on a regular basis (R. 702), have lost a portion of their market, while Texas manufacturers of modular/industrialized homes have been protected from out-of-state competition.

The Fifth Circuit erred in not applying the correct analysis to its examination of whether Ordinance 259 discriminates against interstate commerce in violation of the Dormant Commerce Clause. If it had applied the correct test for discrimination, it would have found that the ordinance is discriminatory in its practical effect and imposes an unconstitutional burden on interstate commerce, which protects certain in-state housing producers at the expense of the opportunity for its citizens to obtain more affordable housing from the interstate market.

C. The Fifth Circuit Misapplied the *Pike* Test.

Even if this Court finds that the Fifth Circuit was correct in using the standard established in *Pike v. Bruce Church*, 397 U.S. 137 (1970), the Fifth Circuit misapplied this standard. Under the *Pike* test, if the ordinance serves a legitimate local purpose, it will be found to be invalid if the burden imposed on interstate commerce is excessive in relation to the local benefits and the locality does not show an absence of less burdensome alternatives.

In a recent District Court case in the Eleventh Circuit, *Georgia Manufactured Housing Association v. Spalding County, Ga.*, No. 3:94-CV-51-GET (N.D. Ga., unreported, June 13, 1996), *reh'g denied,* (N.D. Ga., unreported, Feb. 6, 1997), the court did not find the ordinance to constitute "sheer economic protectionism against out-of-state commerce." However, it did find that the burden the ordinance's 4:12 roof pitch requirement placed upon manufactured homes traditionally transported in interstate commerce was "clearly excessive in relation to [its] putative local benefits." *Id.* at 21 (*quoting Pike v. Bruce Church*, at 142). The court went on to recognize that the 4:12 roof pitch requirement caused significant problems for manufactured home manufacturers both within and

outside of the state, and threatened "to significantly increase the cost of manufactured homes not only to members of the industry but also to the purchasing public." It found the aesthetic and compatibility value of 4:12 pitched roofs to be "minimal at best." *Id.* In denying Spalding County's motion for rehearing, the District Court explicitly rejected the Fifth Circuit's Commerce Clause test in Petitioners' case stating that:

> [I]n this circuit, however, when a challenged regulation imposes substantial economic burdens on both intrastate and interstate commerce . . . , the local benefits of enforcing the regulation must be great before the regulation will be found to be valid.

Georgia Manufactured Housing Association v. Spalding County, Ga., reh'g denied, No. 3:94-CV-51-GET at 7 (N.D. Ga., unreported, Feb. 6, 1997) (*citing National Solid Waste Management Ass'n v. Alabama Dept. of Envtl. Management*, 910 F.2d 713, 725 (11th Cir. 1990)).

In Petitioners' case, the application of the *Pike* test necessitates a factual evaluation. Summary judgment was clearly inappropriate to dispose of the Petitioners' Dormant Commerce Clause challenge.

CONCLUSION

The NMHCSSA is unique in that it contains an express preemption provision which prohibits states and localities from establishing construction and safety standards applicable to manufactured homes which are not identical to the Federal standards. 42 U.S.C. § 5403(d). The Fifth Circuit's decision creates a wide loophole which allows a locality, such as Nederland, to thwart the intent of Congress by promulgating an ordinance that displays no conflict in the mere reading of its language, regardless of its effect. The Fifth Circuit erred in not analyzing the effects of

the Nederland ordinance. This Court should look to the Eleventh Circuit's decision in *Scurlock* and to HUD's own interpretations of the Act's preemption, which have concluded that the preemption analysis should not be based just on the language of the ordinance, but also on whether it is applied and enforced in a manner that contravenes the Act. When the effects of Ordinance 259 are analyzed, it must be held to be preempted as presenting the exact situation that is specifically described by HUD in its *Guidance on Preemption* and *Statement of Policy*. (App. A and App. B).

The Dormant Commerce Clause plays a critical role in ensuring the affordability and availability of manufactured housing to the Nation's consumers by prohibiting states from unjustifiably discriminating against interstate commerce. Nederland's Ordinance 259 unconstitutionally burdens interstate commerce as it affects manufactured housing and should not be allowed to stand. The Fifth Circuit failed to apply the correct analysis as established by this Court in *Oregon Waste Systems* and *Hughes* for determining discrimination by failing to determine if the ordinance is discriminatory by its effect. *Oregon*, 114 S. Ct. at 1350; *Hughes*, 441 U.S. at 336. Ordinance 259 discriminates as applied because the City makes a distinction between HUD Code homes, which are produced both in-state and out-of-state, and industrialized/ modular homes, which are only produced and sold in-state.

The Fifth Circuit went on to misapply the *Pike* test, which necessitates a factual evaluation.

To allow the Fifth Circuit's ruling to stand would dramatically thwart the intent of Congress to provide a uniform Federal standard for manufactured housing, and would seriously impact the availability of affordable housing to low and moderate income families that Congress desired to preserve.

For the foregoing reasons, and for the reasons set forth in the

Petition for a Writ of Certiorari, this Court should grant the Petition, and reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A — FEDERAL REGISTER DATED JANUARY 23, 1997 (VOLUME 62, NUMBER 15)

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3282

[Docket No. FR-4192-N-01]

Manufactured Housing Construction and Safety Standards: Notice of Internal Guidance on Preemption

AGENCY: Office of the Assistant Secretary for Housing — Federal Housing Commissioner, HUD.

ACTION: Notice of staff guidance.

SUMMARY: The Office of Consumer and Regulatory Affairs in HUD has developed guidelines to assist its staff in addressing preemption issues concerning the National Manufactured Housing Construction and Safety Standards Act of 1974. Because of the interest of outside persons in the subject generally, HUD has decided to publish these internal guidelines to assist regulated entities and consumers in understanding the guidelines under which HUD will be operating. These guidelines are not binding on either HUD or the public and are published for informational purposes only.

FOR FURTHER INFORMATION CONTACT: David R. Williamson, Director, Office of Consumer and Regulatory Affairs, Department of Housing and Urban Development, Room 9156, 451 Seventh Street, SW., Washington, DC 20410-0500; telephone (202) 708-6401, or on e-mail through Internet at David _ R. _ Williamson@hud.gov. For hearing and speech-impaired

persons, the telephone number may be accessed via TTY (text telephone) by calling the Federal Information Relay Service at 1-800-877-8339. (Other than the "800" number, these telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The staff guidelines reproduced in this notice are internal guidance to assist the HUD office administering the manufactured housing program in answering questions from the public as to whether particular State or local laws or regulations are preempted by the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401-5426) (the Act). The guidelines are based upon the Act and its implementing regulations in 24 CFR parts 3280, 3282, and 3800 and do not provide new interpretations of the Act or create new HUD policy. The guidelines were developed to assist HUD staff in giving uniform and timely responses to the public, including consumers and affected industries, and State and local governments on preemption issues.

HUD is publishing these guidelines because of the interest in preemption questions that has been expressed by members of these groups. HUD welcomes comments on these guidelines. Anyone wishing to comment on these guidelines may do so by submitting written comments to the attention of the person listed in the "For Further Information Contact" section of this notice.

The internal guidelines that were prepared are as follows:

Guidelines for Analyzing Situations Involving Preemption Under the Manufactured Home Construction and Safety Standards Act

Appendix A

I. Introduction

These guidelines have been prepared to assist in answering questions from the public as to whether particular State or local laws or regulations are preempted by the Act. These guidelines are based upon the National Manufactured Housing Construction and Safety Standards Act and its implementing regulations and are not intended to add new interpretations to the Act or to create new HUD policy.

II. Statutory And Regulatory Background

The Act establishes a national set of construction standards for manufactured housing. To ensure that State or local governments did not enact or allow to continue conflicting construction standards, Congress provided that no State or local government could establish a standard dealing with an aspect of performance that is not identical to those standards established under the Act (section 604(d)). However, where there is no Federal standard, the States are free to act (section 623(a)).

HUD has interpreted these statutory provisions in its regulations implementing the Act (24 CFR 3282.11). In accordance with the Act, the regulation bars States from imposing a manufactured home standard regarding construction and safety that covers the same aspects of performance governed by a Federal standard. More generally, States may not take any action that could interfere with the Federal superintendence of the industry as established by the Act (24 CFR 3282.11).

The Act does not impose a duty on HUD to make any determinations as to the applicability of the preemption provision, to investigate preemption issues, or to render advisory

opinions regarding preemption questions. Further, a State is not specifically prohibited under section 610 of the Act from implementing a provision that is preempted, nor is there any requirement under the Act for the Secretary to enforce the preemption provision. Generally, enforcement of preemption requirements is left up to the Courts. Where an issue is unclear, it is appropriate for the Courts to decide whether a State or local requirement is preempted.

To the extent possible, HUD wishes to be responsive to inquiries of consumers, the industry, and State or local governments on the applicability of preemption. These responses should be considered as an effort by HUD to advise the public of its construction of the statute and the rules which it administers, and to give its opinion as to the applicable law and the particular facts.

III. Guidelines for Specific Situations

Most inquiries can be responded to merely by discerning if there is a specific Federal standard which addresses the same aspect of performance as the State standard. If so, the Federal law preempts the State law. In a significant number of cases, however, the determination is not as clear and requires either an engineering or legal analysis, or both. There are four general areas of inquiry which are frequently raised:

A. Installation

There is no specific Federal standard that deals with the installation of manufactured homes. As such, standards as to the installation of manufactured homes can be regulated by local or State governments and are not preempted under the Act.

It is possible, however, that a local installation rule may hinder the implementation of Federal standards. For example, the implementation of a local rule may conflict with a requirement of a Federal construction standard for plumbing or water hookup. In such cases, the local rule is preempted.

B. Zoning

Normally, zoning issues fall outside the scope of the preemption provisions of sections 604 of the Act. There may be limited instances, however, in which the Federal definition of "manufactured home" could fall within the broad definitions applied to prefabricated or factory built homes under the local zoning ordinance. Such homes are treated differently depending on the building code under which they are constructed.

Generally, the enforcement of a local ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Act because such enforcement rests on the locality's right to determine proper land use. In addition, a locality is free to adopt and enforce ordinances that regulate the appearance and dimensions of homes so long as the criteria established by such ordinances do not have the effect of excluding manufactured homes based on the construction and safety standards to which they were built. Such regulation of aesthetics protects property values, preserves the character and integrity of communities and neighborhoods, and assures architectural compatibility.

If a locality, however, is attempting to regulate, and even exclude, certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different from that prescribed by the Act, the locality lacks

such authority. Thus, a locality cannot accept structures meeting the Federal definition of manufactured homes which comply with different standards, such as the local or State Building Code, and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal standards. By excluding or restricting only manufactured homes built to the Federal standards, and accepting manufactured homes built to other codes, the locality is establishing standards different than the Federal standards.

A locality is not in conflict with the preemptive provisions of the Act if, without regard to construction standards, it treats all structures that meet the Federal definition of Manufactured Homes the same under local zoning laws.

C. State Enforcement

A number of questions have arisen as to when a State's enforcement of manufactured housing standards are preempted by Federal law. HUD's regulations at 24 CFR 3282.11(c) and (d) set forth a clear standard as to the appropriateness of State enforcement of its manufactured home standards. The Federal regulations prohibit a State from establishing a code enforcement system for manufactured homes which is outside, or goes beyond, those enforcement procedures specifically set forth in the Federal regulations. "The test of whether a State rule or action is valid or must give way is whether the State rule can be enforced, or the action taken, without impairing the Federal superintendence of the manufactured home industry as established by the Act" (24 CFR 3282.11(d)). There are several specific situations:

1. A State, as a State Administrative Agency (SAA) under

section 623 of the Act, can enforce the Federal standards. It may also enforce State standards which are identical to the Federal standards. Such actions would not be preempted. However, the State's system of enforcing these standards must be identical to the enforcement procedures in the Federal regulations. "No State may establish * * * procedures or requirements * * * which * * * require remedial actions which are not required by the Act and the regulations" (24 CFR 3282.11(c)).

2. A State may enforce its own consumer protection or warranty laws as to defects in individual homes. As such, a State may require a manufacturer to correct non-compliances and defects in response to individual consumer complaints. Such acts would not be preempted by Federal law (24 CFR 3282.11(d)).

3. Notwithstanding the above, however, there are limitations on a State's actions to correct individual homes. These are situations in which State action would interfere with Federal superintendence of the manufactured home industry.

(a) *Imminent safety hazards or serious defects.* Where it appears that there is an imminent safety hazard or a serious defect, the State is required to refer the matter to HUD for enforcement (24 CFR 3282.405(b) and 3282.407(a)).

(b) *Class of manufactured homes.* Where it appears that the same defect exists in a class of manufactured homes and the State is not the State in which the homes were produced, then the State is required to refer the matter to the SAA in the State in which the homes were produced or to HUD (if there is no SAA in the State of production) for enforcement. Further, if a

class of defective homes is produced in more than one state, HUD is responsible for the enforcement actions. If the homes were all manufactured in the State, the State may take actions, consistent with the Federal **regulations**, with regard to the noncompliance and defects (24 CFR 3282.405(b) and 3282.407(a)(3)).

(c) *Prior HUD enforcement.* Where HUD has already taken action to have a class of serious defects corrected, then the State is preempted from taking corrective actions of its own pursuant to the Act (24 CFR 3282.404(e)).

D. Utility Companies

There have been a few utility companies which have attempted to impose their own construction or safety standards on manufactured homes as a requirement for connection to their services. The Act, by its express terms, prohibits only "State or political subdivisions of a State" from establishing standards that conflict with the Federal standards (section 604(d)). Accordingly, if the utility company is owned or controlled by a political subdivision, its standards are preempted by the Federal standards. If the utility is privately owned, its standards would not be preempted.

E. State Construction and Safety Standards

1. *Aspects of performance.* Additional questions arise in situations in which the State or locality attempts to apply its own building or safety code to the manufactured home. Under section 604 of the Act, State law is preempted whenever there is a State performance standard regarding construction and safety that is not identical to an established Federal standard. On the

other hand, section 623 of the Act provides that Federal law does not preempt State construction or safety standards for which a Federal standard had not been established. Thus, for there to be Federal preemption, there must be a specific aspect of a Federal performance standard which duplicates a local standard.

Federal preemption cannot be based upon a general purpose of the Act, or the need for national uniformity in the manufactured housing industry. The courts have applied this "aspect of performance" standard in analogous situations by focusing not on the purpose or scope of the Act, but, rather, on the specific requirements of an established Federal standard. If the Federal standard is encompassed or impacted by the State requirement, the State law is preempted.

2. *Superintendence.* It is also possible that a State or local law may be preempted even though the local rule does not meet the differing aspect of performance standard. As stated above, 24 CFR 3282.11(d) sets forth an additional standard of preemption. A State rule must give way if it impairs the Federal superintendence of the manufactured home industry as established by the Act.

Thus, for example, a local requirement that all homes be constructed on site, while not covering any aspect of performance, would be so fundamentally in conflict with the Federal standards as to impair the Federal superintendence of the manufactured home program. Such a requirement would be preempted under the HUD regulations.

The scope of this regulatory provision is limited by the language "as established by the Act". This language limits the Federal superintendence of the industry, since section 604(d)

of the Act limits the preemption of standards to only those issues dealing with the same aspects of performance.

Authority: 42 U.S.C. 3535(d) and 5401 et seq.

Dated: January 14, 1997.

Stephanie A. Smith,

General Deputy, Assistant Secretary for Housing-Federal Housing Commissioner.

[FR Doc. 97-1646 Filed 1-22-97; 8:45 am]

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APPENDIX B — HUD STATEMENT OF POLICY

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 3280 and 3282

[Docket No. FR-4223-N-01]

Manufactured Housing: Statement of Policy 1997-1, State and Local Zoning Determinations Involving HUD-Code

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Statement of policy.

SUMMARY: This Statement of Policy provides notice to the public concerning HUD's application of the National Manufactured Housing Construction and Safety Standards Act of 1974 (Act) to certain zoning decisions being made by State or local government. These cases typically involve State or local actions to prohibit the siting of HUD-code manufactured housing while permitting the siting of other types of manufactured housing built to State or local building codes.

If a locality is attempting to regulate and even exclude certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different than that prescribed by the Act, the locality is without authority to do so. This Statement of Policy is being provided to clarify and distribute HUD's existing policy determination concerning this matter.

FOR FURTHER INFORMATION CONTACT: David R.

Williamson, Director, Office of Consumer and Regulatory Affairs, Department of Housing and Urban Development, 451 7th St. SW, Room 9152, Washington, D.C. 20410-8000), telephone number (202) 708-6409 (this is not a toll-free number). For hearing-and speech-impaired persons, this number may be accessed via TTY by calling the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

Over the last few years, HUD has received a number of questions concerning the application of the Federal preemption authority in the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401-5426) (Act) to actions by State or local government. HUD recently published a nonbinding notice of staff guidance, which it hoped would assist the public on some of these questions (62 FR 3456, January 23, 1997).

In certain cases involving questions of preemption and zoning, the State or local government is imposing more limitations on the placement of manufactured homes that are built to the Federal manufactured home construction and safety standards (24 CFR part 3282) (Federal standards) than on other types of factory-built single family housing. In the past, HUD has sent letters to various communities in such cases, where local zoning laws are in direct conflict with the Federal Act and regulations.

Appendix B

II. Increasing Homeownship and the Supply and Availability of Affordable Housing

The elimination of barriers to the expanded use of affordable housing, including manufactured homes, has been one of the primary objectives of the President's National Homeownership Strategy. HUD coordinates the National Partners in Homeownership, which now has over 60 national organizations participating, including State, county and local governments, and other groups, to identify and promote ways to increase homeownership and the supply of affordable housing. The Strategy includes the following goals and objectives in Action Item 27:

- The partnership should identify and promote zoning and land development policies that are more conducive to manufactured housing. As part of this initiative, partners should develop model legislation for states and localities to adopt that prohibits exclusion of manufactured housing solely on the basis of HUD certification (manufacturer certification that the home has been constructed to the Federal standards).

- The partners also should produce design and land development criteria and guidance materials for use by housing developers and local governments, to facilitate inclusion of manufactured housing in their jurisdictions. To supplement these efforts, the partnership should offer a cooperative program of education and technical assistance to encourage nationwide acceptance of the model legislation within 6 years.

HUD strongly endorses this Action Item, particularly making available sites for manufactured housing outside of parks and largely rural areas. On March 22, 1996, the Manufactured

Housing Institute (MHI) and the American Planning Association (APA) convened a National Partners in Homeownership Forum to discuss zoning and other issues. The Forum drew over 100 attendees including planners, housing-advocacy organizations, and representatives from the manufactured housing industry.

The attendees reached an almost unanimous consensus that very real zoning and other regulatory barriers exist that significantly hinder the full use of manufactured housing. The Forum produced a series of recommendations to HUD and the National Partners in Homeownership, including APA and MHI.

This Statement of Policy is being issued as an initial step toward the elimination of barriers to the use of manufactured housing and in furtherance of the goals and objectives of the National Homeownership Strategy.

III. Requirements of Act and Regulations

Section 604(d) of the Act, 42 U.S.C. 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Act] is in effect, no State or political subdivision of a State shall have any authority * * * to establish, * * * with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

The term "manufactured home" is defined in section 603(6)

of the Act, 42 U.S.C. 5402(6). In addition, Sec. 3282.11(d) of the Manufactured Home Procedural and Enforcement Regulations (24 CFR part 3282) prohibits any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Conversely, section 623(a) of the Act (42 U.S.C. 5422(a)) provides:

> Nothing in this [Act] shall prevent any State agency or court from asserting jurisdiction under State law over any manufactured home construction or safety issue with respect to which no Federal manufactured home construction and safety standard has been established. * * *

IV. Statement of Policy 1997-1

Generally, the adoption and enforcement of a local zoning ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Act because such actions are exercises of the locality's authority to determine proper land use. Under section 604(d) of the Act (42 U.S.C. 5403(d)), however, the locality is without authority to regulate or exclude certain manufactured homes through zoning ordinances or enforcement decisions that are based solely on a construction and safety code that is different from the Federal standards prescribed under the Act.

For example, assume two structures are brought into a locality and both structures are: 320 or more square feet when erected on site; built on a permanent chassis; and transported in

one or more sections. If the locality only allows the structure that is built to the State or local building code to be sited outside an approved mobile home park, the locality would be acting without authority. If under the local zoning laws the locality accords the same treatment to all structures that meet the Act's definition of a "Manufactured home" (42 U.S.C. 5402(6)), the locality is not in conflict with the preemptive provisions of the Act.

Therefore, a locality cannot exclude or restrict manufactured homes that meet the Federal standards if the locality accepts manufactured homes meeting other standards. By excluding or restricting only manufactured homes built to the Federal standards and accepting manufactured homes built to State or local codes, the locality is establishing standards for manufactured homes that are different from the Federal standards. To the extent that the provisions or enforcement of local zoning regulations require that manufactured homes meet standards other that the Federal standards for manufactured homes, those local actions are preempted by section 604(d) of the Act (42 U.S.C. 5403(d)). Furthermore, such a system of local regulation and enforcement would interfere with Federal superintendence of the manufactured home industry, in contravention of 24 CFR 3282.11(d).

Dated: April 24, 1997

Nicolas P. Retsinas,

Assistant Secretary for Housing-
Federal Housing Commissioner

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